Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

MICHAEL CORNWELL, HILARY IKER

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent

On Petition for a Writ of Certiorari

to the United States Court of Appeals

for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

Michael Cornwell
Hilary J. Iker
2395 Kenilworth Avenue
Los Angeles, CA 90039
(323) 663-0345

QUESTIONS PRESENTED

1. Whether IRS Appeals Officers holding hearings and issuing determinations in excess of powers granted Tax Court Special Trial Judges in Collection Due Process hearings are "Officers of the United States' who have to be appointed under the appointments clause of the Constitution. (Art. II, sec 2, cl. 2).

2. When the standard of review is abuse of discretion, whether the scope of review allowing extra record evidence in lien/levy hearings under the same federal statutes, 26 U.S.C. §§ 6320, 6330, among the Tax Courts and circuits should be uniform so that extra administrative record is permitted in the Tax Court and some circuits but not the Eighth. First, and Ninth, which expressly restrict evidence to the administrative record.

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, petitioners state that they have no parent companies or wholly owned subsidiaries.

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OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, A-2) is unreported. The opinion of the Tax Court (App., *infra*, A-4) is reported at T.C. Memo 2007-294.

JURISDICTION

The court of appeals judgment was entered on May 26, 2009. A timely petition for rehearing was denied on August 27, 2009. (App., *infra*, A-1) Associate Justice Anthony M. Kennedy extended the time to December 10, 2009 to file this Petition. (Application 09A463). The jurisdiction of this court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Appointments Clause of the Constitution provides in relevant part: [The President] shall nominate, and by and with the Advice and Consent of the Senate shall appoint Ambassadors, other public Minsters and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law: but the Congress may by Law vest the appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments. U.S. CONST. Art. II, sect. 2, cl. 2.

The relevant provisions of the IRS Restructuring and Reform Act of 1998, 26 U.S.C. §§ 6320, 6330, are reproduced at App., *infra*, A-13, A-16.

STATEMENT

When Congress passed the IRS Restructuring and Reform Act of 1998, it had two unintended consequences:

A. The Appointments Clause

First, the Act created IRS Appeals Officers and gave them new, broad powers that changed their position from employee to Officer of the United States requiring appointment under the Constitution at Article II, section 2, clause 2. These powers exceeded those of Special Trial Judges. Even "inferior officers" require appointment by the "head of an agency" and the Commissioner is not the Treasury Secretary. There is no question Appeals Officers meet this Court's test as an "inferior officer" under this Court's *Buckley* decision. *Buckley v. Valeo*, 424 U.S. 1, 126, 96 S.Ct. 612 (1976). They meet every essential prong of this Court's *Freytag* test. *Freytag v. Commissioner*, 501 U.S. 868, 111 S.Ct. 2631 (1991). So concerned was the Supreme Court with appointments clause violations that its *Freytag* decision allowed the issue concerning Special Trial Judges to be raised for the first time in a certiorari brief. Many of the Appeals Officers were elevated from collection officers.

The Solicitor General need not look far for its research in response. The Department of Justice recently published a Memorandum Opinion for the General Counsels of the Executive Branch entitled "Officers of the United States for Purposes of the Appointments Clause" (hereinafter DOJ Opinion). 2007 WL 1405459. Appeals Officers meet the requirement for appointment under the DOJ analysis. Generally, administrative law judges were the solution as with Social Security. However, no appointment mechanism was provided for the IRS. The Commissioner recently judicially admitted that no Appeals CDP personnel have ever been appointed under the procedures allowed by the Appointments Clause. (*Larry E. Tucker v CIR*, Tax Court Docket No.

3165-06L). (Appendix, *infra*, A-22. Though the general rule on admissions is they can't be used in a different case, this is an admission by the Commissioner as to his routine practice nationwide, not one specific case. Many revenue officers suddenly became elevated to judges for their agency. The statute prescribed impartiality as, not appeal to a judge or third party, but an elevated man from the same agency who had not seen the case before. This is akin to the legality of a speeding ticket being appealed to the desk sergeant of the highway patrol, not the traffic court. If the 2007 figure is representative, the Appeals Office closed 34,648 cases. Projected backward over 10 years from the date the statute became effective, over 300,000 cases are potentially voidable.

B. Nonuniform Application of Same Federal Statute Among the Tax Court and the Circuits.

Second, the Act allowed Appeals Officers' final decisions to be challenged in court for the first time. This results in the functional equivalent of a circuit split among the lone national Tax Court and every circuit that expressly overrules it. The Eighth Circuit held that the Tax Court's review in an abuse of discretion case is limited to the administrative record. The reasoning was that an Appeals Officer could not abuse his discretion on evidence never proffered to consider. *Robinette v. CIR*, 439 F.3d 455 (8th Cir. 2006). The First Circuit followed the Eighth a few months later, noting every U.S. District court to consider the issue limited to the administrative record. *Murphy v. CIR*, 469 F.3d 27 (1st Cir. 2006). The Ninth Circuit chose not to reach the record rule in this case, though it was the central issue. Yet one week later, another Ninth Circuit panel published the controlling precedent that Tax Court review was limited to the administrative record in the Ninth Circuit. *Keller v. CIR*, 568 F.3d 710 (9th Cir. June 3, 2009).

The Commissioner is the Tax Court's permanent customer. The Commissioner's previously fluctuating position that administrative record rule should not

control in the Ninth Circuit, has changed to a universal policy that judicial review should be limited to the administrative record in abuse of discretion cases. The Commissioner also argues that judicial review should be limited to abuse of discretion in innocent spouse cases, though that standard of review is *de novo*. Record review assumes the record is sacrosanct. Here, the Commissioner judicially admitted that his Appeals Officer chose not to consider evidence and omit it from a reviewing court.

The Tax Court's *Golsen* Rule allows the lone national Tax Court to rule differently in one circuit than another on the same set of facts. *Golsen v. Commissioner*, 54 T.C. 742, 756 (1970) affd. 445 F.2d 985 (10th Cir. 1971). Under *Golsen*, the Tax Court would not follow its own precedents only if expressly overruled by the Circuit it visited that week. If a circuit overruled a Tax Court precedent, the Tax Court does not follow the overruling circuit law in other circuits. This means that the same set of facts would get one ruling in the Eighth Circuit which overruled it, but a different ruling in the Ninth Circuit which has not. And yet a different ruling in the Ninth Circuit when, a week later, another Ninth Circuit panel adopts a controlling precedent that the Eighth Circuit was right and the rule is different now.

The Tax Court's *Porter* re-decision illustrates the conflict within itself:

> We concur in so much of the majority opinion as holds the appropriate standard of review to be de novo. We do so notwithstanding our dissent in the Court's prior report in this case, *Porter v. Commissioner*, 130 T.C. 115, 146-147 (2008), holding that the appropriate scope of review is de novo. That holding is now binding on us, and for that reason alone we concur that "it would be incongruous to hold that review is limited to determining whether an appeals officer 'abused his discretion,' but also to

> conclude that the appeals officer committed such an'abuse' by failing to weigh information that was never even presented to him." *Robinette v. Commissioner*, 439 F.3d 455, 460 (8th Cir. 2006) (addressing the scope and standard of review appropriate to judicial review of an Appeals officer's decision under section 6330), revg. 123 T.C. 85 (2004).

Porter v. Commissioner, 132 T.C. No. 11 (April 23, 2009).

Here, in open court, the Tax Court requested and received a straightforward judicial admission from Petitioner Cornwell about the effect of the faxes concerning changed economic circumstances. For the first time, the Tax Court stated its review was not limited to the administrative record:

> "Now as far as the scope of the consideration of the Court, the Court has not adopted Robinette or Murphy as the law in this Circuit. It seems contrary to the law in this Circuit to the extent it exists. . ." [Reporter's Transcript, p. 8:25-9:4] [ER 144]

In adopting the *Robinette* record rule, the Ninth Circuit reaffirmed in practice its precedent that "the tax decisions of other circuits should be followed unless they are demonstrably erroneous or there appear cogent reasons for rejecting them." *Beecher v. Comm'r*, 481 F.3d 717, 720 (9th Cir. 2007) citing *Popov v. Comm'r*, 246 F.3d 1190, 1195 (9th Cir.2001) . The *Popov* court held: "Uniformity of decision among the circuits is vitally important on issues concerning the administration of tax laws. Thus the tax decisions of other circuits should be followed unless they are demonstrably erroneous or there appear cogent reasons for rejecting them." *Unger v. Comm'r*, 936 F.2d 1316, 1320 (D.C.Cir.1991) (quoting *Keasler v. United States*,

766 F.2d 1227, 1233 (8th Cir.1985)).

Good as this call for uniformity among the circuits is, the Tax Court reasoning remains the *Robinette* decision was wrong and it will not follow it until expressly overruled by a circuit.

If there is one federal statute that affects everyone in the country it is taxation. But the Taxpayer in Missouri gets one set of procedure, and the Taxpayer in New Hampshire gets the same break, but everywhere else the same statute is applied a different way. That is the Golsen solution: to avoid Supreme Court clarification, it adopts a rule sanitizing a circuit split.

Here, there was no Tax Court precedent to bruise. The IRS Restructuring and Reform Act of 1998 created new rights to appeal that did not exist before. The Tax Court continued to apply its "redetermination" precedent, a *de novo* review, in cases where review was for abuse of discretion and the Commissioner switched positions until he decided one.

The need for a national solution is all the more necessary because Congress revised its statute to give the Tax Court exclusive jurisdiction over OIC appeals. Unlike a U.S. District Court, the Tax Court will not look to other District Courts or even the Circuits for guidance, unless the Circuit expressly overruled them. Only this Court can provide that uniform guidance for the Tax Court.

C. Background

Once the IRS has notified a taxpayer of its intent to file a notice of lien or to impose a levy, the taxpayer has the right to a CDP hearing before the IRS Office of Appeals. In 1998, Congress established the CDP hearing process to temper "any harshness caused by allowing the IRS to levy on property without any provision for advance hearing." *Olsen v. United States,* 414 F.3d 144, 150 (1st Cir.2005). During the hearing, a taxpayer may raise "any relevant issue relating to the unpaid tax or the proposed levy, including ... offers of collection alternatives, which may

include an offer-in-compromise." 26 U.S.C. § 6330(c)(2)(A).[1]

To proceed with a levy after a CDP hearing, the IRS must verify that it has met all the requirements to move forward with a levy, shall take into consideration the issues and evidence presented by taxpayer, reject the taxpayer's defenses and proposed collection alternatives, and determine that the "proposed collection action balances the need for efficient collection of taxes with the legitimate concern of the person that any collection be no more intrusive than necessary." *Id.* § 6330(c)(3).

This section 6330 appeal could have been filed in either the Tax Court or the U.S. District Court.[2] Under section 6330, if the underlying tax liability is contested, the standard of review by the Tax Court is *de novo*. *Davis v. Commissioner*, 115 T.C. 35, 39 (2000). Where the tax liability is not at issue, the Tax Court reviews for abuse of discretion. *Goza v. Commissioner*, 114 T.C. 176 (2000). In either case, the Tax Court's *scope* of review is limited to the administrative record in the First, Eighth, and now Ninth Circuits. As the Tax Court is a traveling court, in other circuits its review of evidence is *de novo* in that it accepts evidence outside the administrative record. However, every U.S. District Court to consider a section 6330 appeal has limited scope of review to the administrative record. *Olsen v. United States,* 414 F.3d 144, 154 n. 9 (1st Cir.2005).

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[1] Section 6320(c) looks to § 6330 for issues regarding hearings, review of decisions, and suspensions. Therefore, Appellants discuss the procedural requirements as outlined in § 6330 in discussing both the liens and the levy.

[2] Before a 2006 amendment, a section 6330 lien/levy appeal could be obtained in either U S. District Court or the Tax Court. 26 U.S.C. § 6330(d)(1) was amended to give the Tax Court exclusive jurisdiction. This amendment became effective August 17, 2006, after expiration of the appeal period here.

This case could have resolved on a remand motion in Tax Court. Section 6330 requires the government officer to consider all evidence submitted and provide an accurate record to a reviewing court. The judicial admissions in the Commissioner's Answer are:

1. The Commissioner admits that respondent's settlement officer did not consider faxes dated July 5, 2006 and July 11, 2006 in making the determination set forth in the Notice of Determination, but denies that the Commissioner erred in failing to do so. [Answer to Amended Petition, p. 2., ¶5(a).] [ER 102]

2. The Commissioner admitted on April 12, 2007 that Appellants' faxes dated July 5, 2006 and July 11, 2006, were not made part of the administrative record. [Answer to Amended Petition, p. 5, ¶ 7(n).] [ER 105]

3. The Commissioner judicially admits that he does not contest the faxes of July 5, 2006 and July 11, 2006 were actually sent on those dates and does not contest the accuracy of the statements made in said faxes.

Compare to Petitioners' First Amended Petition. (App., *infra*, A-24).

At the May 14, 2007 trial call calendar, the Tax Court denied the Commissioner's summary judgment motion which turned on the failure to consider the faxes and include them in the administrative record. The Tax Court also denied Appellants' remand motion seeking remand on the basis the Appeals Officer chose not to consider a key issue and include it in the record. The Commissioner argued that the *Robinette* record review should control this case.

In open court, the Tax Court requested and received a straightforward judicial admission from Petitioner Cornwell about the effect of the faxes concerning changed economic circumstances.

For the first time, the Tax Court stated its review was <u>not</u> limited to the administrative record:

> "Now as far as the scope of the consideration of the Court, the Court has

not adopted Robinette or Murphy as the law in this Circuit. It seems contrary to the law in this Circuit to the extent it exists. . ." [Reporter's Transcript, p. 8:25-9:4] [ER 144]

The parties submitted the case on the record. [ER 145:11-13]

The Tax Court's Memorandum Opinion affirmed the IRS Appeals determination on the basis extra record evidence was not provided.

D. The Court of Appeals Decision

The Commissioner judicially admitted he did not consider evidence of changed circumstances contrary to a mandatory statutory directive. The Ninth Circuit held this error was not prejudicial. The Ninth Circuit declined to reach the administrative record rule argument under 26 U.S.C. §6330 because the tax court did not consider evidence outside the administrative record in this case. A week later another Ninth Circuit panel made it controlling law of the circuit.

REASONS FOR GRANTING THE PETITION

Tax law affects everyone. Review of this case would allow the Court to resolve an important, far-reaching Constitutional problem and fashion an appropriate remedy. The Commissioner recently judicially admitted that no Appeals CDP personnel have ever been appointed under the procedures allowed by the Appointments Clause.(*Larry E. Tucker v CIR*, Tax Court Docket No. 3165-06L) Appendix, *infra*, A-22). IRS Appeals Officers meet this Court's *Buckley* test as at least an inferior officer of the United States. These Appeals Officers meet every essential prong of this Court's *Freytag* test. So concerned was the Supreme Court with appointments clause violations that its *Freytag* decision allowed the issue concerning Special Trial Judges to be raised for the first time in a certiorari brief. Moreover, Appeals Officers meet the criteria for appointment under the

DOJ Opinion. If the published 2007 figure is representative, the Appeals Office closed 34,648 cases. Projected backward over 10 years from the date the statute became effective, over 300,000 cases are potentially voidable.

This Court should address this issue now, so as to prevent another 34,648 cases a year to accumulate.

Review of this case would also allow this Court to resolve the functional equivalent of a circuit split among the Eighth, First, and Ninth Circuits on one hand, and the lone Tax Court and remaining circuits on the other, concerning the admission of extra record evidence. Whether this Court adopts the administrative record rule, the Tax Court's *de novo* scope of review, or some other approach, it would result in uniformity such that the same set of facts based on the same federal statute would not yield different outcomes depending on geography.

ARGUMENTS

I. The Appointments Clause is Violated in CDP Hearings

A. Background

In the IRS Restructuring and Reform Act of 1998, Congress created the "Collection Due Process" (hereinafter, "CDP") provisions of the Internal Revenue Code at sections 6320 and 6330. These provisions allow taxpayers to request hearings at the IRS Appeals Office level either shortly before or shortly after the IRS takes either one or two incredibly intrusive and financially catastrophic collections actions: levy or filing a notice of federal tax lien.

The hearing employees were being given such powers by law that they also had to be appointed under the Appointments Clause. Congress passed no law delegating appointment power to anyone with respect to the Appeals Office CDP hearing personnel, and the President did not submit the names of any CDP

hearing personnel to the Congress for their appointment with the advice and consent of the Senate.

The issue petitioners raise is whether these Appeals Office employees holding and issuing notices of determination in the new CDP hearings are "Officers of the United States" who have to be appointed under the Appointments Clause. Petitioners argue that they do have to be appointed under the procedures of the Clause. Because they have not been, any notices of determination that they have issued in the past 10 years have been issued *ultra vires* and are, potentially, voidable. In the instant case, the proper remedy is to hold the Notice of Determination issued void and not to give them any deference.

To date, IRS Appeals employees are treated very differently from usual administrative law judges and administrative tribunal members under the Appointments Clause. In most areas of the law outside taxes, individuals who hold administrative hearings are appointed. Social Security disability benefits determinations are made by administrative law judges, appointed, pursuant to 5 U.S.C. §3105,85 by the Secretary of Health and Human Services under a statutory delegation complying with the Appointments Clause. The administrative law judges make binding decisions under 5 U.S.C. §557(b), subject to appellate review, first, by the Appeals Council, then, if desired, in the district courts. By way of dicta, Justice Scalia noted in his concurrence in *Freytag*: "Today, the Federal Government has a corps of administrative law judges numbering more than 1,000, whose principal statutory function is the conduct of adjudication under the Administrative Procedure Act (APA), see 5 U. S. C. §§554, 3105. They are all executive officers." *Freytag*, 501 U.S. at 910. Three other Justices joined Justice Scalia in his concurrence. The majority in Freytag that cited, for the proposition that Tax Court Special Trial Judges are "Officers", the Tax Court's opinion on the same issue in *First Western Government Securities, Inc. v. Commissioner. Id.*, 501 U.S. at 881 In that opinion, the Tax Court itself noted: "Congress permits

administrative agencies to appoint their own administrative law judges who perform duties similar to those of special trial judges. 5 U.S.C. §3105 (1982)."

Professor Carlton Smith states this argument has not been made in any court before it was raised in his Tax Court case, *Larry Tucker v. Commissioner.* Smith, Carlton, "Does the Failure to Appoint Collection Due Process Hearing Officers Violate the Constitution's Appointments Clause," Benjamin N. Cardozo School of Law, October 2008 Working, Paper No. 245. Nor has he found reference to such an argument in any law review or tax publication. Thus, it is an issue of first impression both in the courts and in the public forum.

The Appointments Clause of the Constitution at Article II, section 2, clause 2, reads:

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

In *Freytag, supra,* the Supreme Court stated:

> The "manipulation of official appointments" had long been one of the American revolutionary generation's greatest grievances against executive power, see G. Wood, The Creation of The American Republic 1776-1787, p. 79 (1969) (Wood), because "the power of appointment to offices" was deemed "the most insidious and powerful weapon of

> eighteenth century despotism." Id., at 143. . . . The Framers understood . . . that by limiting the appointment power, they could ensure that those who wielded it were accountable to political force and the will of the people. Thus, the Clause bespeaks a principle of limitation by dividing the power to appoint the principal federal officers -- ambassadors, ministers, heads of departments, and judges -- between the Executive and Legislative Branches. See *Buckley*, 424 U.S. at 129-131. Even with respect to "inferior Officers," the Clause allows Congress only limited authority to devolve appointment power on the President, his heads of departments, and the courts of law. *Freytag*, 501 U.S. at 883.

The clause, however, only applies to "Officers of the United States", not independent contractors, "lesser functionaries", or mere employees of the government.

Prior to the 1998 Act, Appeals Officers, Settlement Officers, and Appeals Team Managers were mere employees. They were not mentioned in the United States Code or any law of the United States, and they had no statutory duties expressly given to them to fulfill. Thus, their jobs were not "established by Law", within the meaning of the Appointments Clause.

However, the 1998 Act for the first time named "appeals officers", gave them record-gathering and adjudicative powers, and allowed them to issue final determinations in the following areas as part of newly-created CDP hearings: (1) the applicability of "appropriate spousal defenses" (i.e., whether section 6015 relieved a spouse of joint and several liability for taxes on a joint income tax return), (2) "challenges to the appropriateness of collection actions" (i.e., whether a levy should go forward or whether a notice of federal tax lien should be removed), (3) "offers of collection alternatives" (e.g., posting of a bond, substitution of

other assets, installment agreements, or offers in compromise), and (4) in certain circumstances, "challenges to the existence or amount of the underlying tax liability for any tax period" – all without limitation as to the amount in controversy.

Congress instructed the "appeals officer" in how to conduct the CDP hearing by requiring that "[t]he appeals officer shall at the hearing obtain verification from the Secretary that the requirements of any applicable law or administrative procedure have been met." Congress also required that "[t]he determination by an appeals officer . . . take into consideration . . . whether any proposed collection action balances the need for the efficient collection of taxes with the legitimate concern of the person that any collection action be no more intrusive than necessary." Congress guaranteed that the CDP hearing would be conducted by an impartial Appeals "officer or employee who has had no prior involvement with respect to the unpaid tax."

Outside the CDP area, the 1998 Act added a new section 7122(d) (later redesignated (e) in 2006) that required that taxpayers have a right to appeal any rejection of a proposed installment agreement or offer in compromise to an Appeals Officer. The 1998 Act also required that an Appeals Officer "is regularly available within each state," and that to "ensure an independent appeals function within the Internal Revenue Service" there be a "prohibition . . . of ex parte communications between appeals officers and other Internal Revenue Service employees to the extent that such communications appear to compromise the independence of the appeals officers."

All of these 1998 Act provisions make it clear that an "Appeals Officer" is a position now "established by Law" and that Appeals Officers are now "Officers of the United States" for purposes of the Appointments Clause.

Assuming that Settlement Officers are authorized by Congress to act as the "appeals officer" described in the CDP provisions, then Settlement Officers, too, are "Officers of the United States" and have to be properly

appointed.

Assuming that neither Appeals Officers nor Settlement Officers actually enter the binding determinations after CDP hearings, but those determinations are properly made by Appeals Team Managers purporting to act under the statutory grant of authority to "appeals officers", then Appeals Team Managers are also "Officers of the United States" and have to be properly appointed.

On March 17, 2003, the Chief of Appeals issued Appeals Delegation Order No. 8-a, which (a) delegated to Appeals Officers and Settlement Officers the authority "to conduct hearings and make determinations" under sections 6320 and 6330, and (b) delegated to Appeals Team Managers "the authority to review and approve" such determinations. An Appeals Team Manager is a supervisory Appeals officer who is responsible for managing and reviewing Appeals officers within the jurisdiction of a particular Appeals Office. An [Appeals Team Manager's] duties include, *inter alia*, reviewing work for quality and professional standards, approving recommendations by Appeals officers who lack authority to take the recommended action themselves, and supervising the general work performance of Appeals officers.

The Appeals Officer rendering a decision after a CDP hearing is a person exercising sufficient power under the laws of the United States to be required to be appointed under the Appointments Clause. Among Appeals Officers, Settlement Officers, and Appeals Team Managers, at least one is an officer who must be appointed. Appeals Team Managers and those Appeals Officers and Settlement Officers that they supervise are all now "Officers of the United States" who have to be appointed.

The Commissioner has admitted that, "[t]o date, no Appeals Officer, Settlement Officer, or Appeals Team Manager has been appointed to his or her job by the President of the United States with the advice and consent of the Senate," and that, "[n]o statute provides for the appointment of Appeals Officers, Settlement Officers, or Appeals Team Managers by the President

alone, the 'Heads of Department', or the 'Courts of Law', as those terms are used in the Appointments Clause of the Constitution."

On April 16, 2007, the Department of Justice Office of Legal Counsel issued a comprehensive, 132-page Memorandum Opinion for the General Counsels of the Executive Branch, entitled "Officers of the United States for Purposes of the Appointments Clause" (hereinafter, "DOJ Opinion") 2007 WL 1405459. The DOJ Opinion analyzes U.S. Supreme Court Appointment Clause opinions and other governmental rulings, and distills the essential characteristics of an "Officer" for purposes of the Appointments Clause. The DOJ Opinion finds that the 1976 Supreme Court opinion in *Buckley v. Valeo*, sets forth the current requirements for deciding whether a person is an officer or mere employee for purposes of the Clause. The DOJ Opinion concludes that

> any position having the two essential characteristics of a federal "office" is subject to the Appointments Clause. That is, a position, however labeled, is in fact a federal office if (1) it is invested by legal authority with a portion of the sovereign powers of the federal Government, and (2) it is "continuing." A person who would hold such a position must be properly made an "Officer of the United States" by being appointed pursuant to the procedures specified in the Appointments Clause.

B. Court Opinions on the "Officer" Versus "Employee" Issue

Buckley Opinion

The principal Supreme Court opinions providing guidance to decide the issue presented are the Court's 1976 opinion in *Buckley v. Valeo, supra*, and its 1991 opinion in *Freytag v. Commissioner, supra*.

Buckley v. Valeo involved the Federal Election

Campaign Act of 1971. This Court stated:

> The Appointments Clause could, of course, be read as merely dealing with etiquette or protocol in describing "Officers of the United States," but the drafters had a less frivolous purpose in mind. . . .
>
> We think the term "Officers of the United States" as used in Article II . . . is a term intended to have substantive meaning. We think its fair import is that any appointee exercising significant authority pursuant to the laws of the United States is an "Officer of the United States," and must, therefore, be appointed in the manner prescribed by § 2, cl. 2, of that Article." *Buckley*, 424 U.S. at 125, 96 S.Ct. at 685.

The Court held that FEC members were "Officers of the United States", in part, because of their administrative functions, including "rulemaking, advisory opinions, and determinations of eligibility for funds and even for federal elective office itself. . . . [E]ach of these functions . . . represents the performance of a significant governmental duty exercised pursuant to a public law. . . . These administrative functions may therefore be exercised only by persons who are 'Officers of the United States.'"

Of particular relevance were the FEC's duties to render advisory opinions and determine eligibility for funds and office. These duties are highly analogous to the taxpayer-specific collection and underlying tax liability rulings issued by IRS Appeals personnel after CDP hearings.

Freytag Decision

While not identical to Tax Court Special Trial Judges in all respects, Appeals Officers, Settlement

Officers, and/or Appeals Team Managers holding CDP hearings are so similar to Special Trial Judges in all ways that mattered to this Court in its Freytag Appointments Clause analysis that any differences are not of Constitutional significance. By holding CDP hearings and issuing CDP notices of determination, the Appeals personnel exercise significant authority pursuant to the laws of the United States for purposes of the Appointments Clause. Thus, Appeals Officer, Settlement Officers and/or Appeals Team Managers are "Officers of the United States" within the meaning of the Appointments Clause and have to be appointed, currently, by the President with the advice and consent of the Senate.

In *Freytag v. Commissioner, supra*, the Supreme Court faced an Appointments Clause challenge with respect to Tax Court Special Trial Judges holding hearings and issuing proposed findings of fact and opinion in complex tax shelter cases assigned to them by the Tax Court's Chief Judge.

All nine Justices agreed with one thing: Tax Court Special Trial Judges were "Officers of the United States" for purposes of the Appointments Clause. Because what the Court said about this argument is so central to petitioners' argument, the text of the Supreme Court's discussion of this issue is quoted in full:

> We turn to another preliminary issue in petitioners' Appointments Clause challenge. Petitioners argue that a special trial judge is an "inferior Officer" of the United States. If we disagree, and conclude that a special trial judge is only an employee, petitioners' challenge fails, for such "lesser functionaries" need not be selected in compliance with the strict requirements of Article II. Buckley v. Valeo, 424 U.S. 1, 126, n. 162, 46 L. Ed. 2d 659, 96 S. Ct. 612 (1976).
>
> The Commissioner, in contrast to petitioners, argues that a special trial

judge assigned under §7443A(b)(4) acts only as an aide to the Tax Court judge responsible for deciding the case. The special trial judge, as the Commissioner characterizes his work, does no more than assist the Tax Court judge in taking the evidence and preparing the proposed findings and opinion. Thus, the Commissioner concludes, special trial judges acting pursuant to §7443A(b)(4) are employees rather than "Officers of the United States."

"Any appointee exercising significant authority pursuant to the laws of the United States is an 'Officer of the United States,' and must, therefore, be appointed in the manner prescribed by § 2, cl. 2, of [Article II]." Buckley, 424 U.S. at 126.The two courts that have addressed the issue have held that special trial judges are "inferior Officers." The Tax Court so concluded in First Western Govt. Securities, Inc. v. Commissioner, 94 T.C. 549, 557-559 (1990), and the Court of Appeals for the Second Circuit in Samuels, Kramer & Co. v. Commissioner, 930 F.2d 975, 985 (1991), agreed. Both courts considered the degree of authority exercised by the special trial judges to be so "significant" that it was inconsistent with the classifications of "lesser functionaries" or employees. Cf. Go-Bart Importing Co. v. United States, 282 U.S. 344, 352-353, 75 L. Ed. 374, 51 S. Ct. 153 (1931) (United States commissioners are inferior officers). We agree with the Tax Court and the Second Circuit that a special trial judge is an "inferior Officer" whose appointment must conform to the Appointments Clause.

The Commissioner reasons that special trial judges may be deemed

employees in subsection (b)(4) cases because they lack authority to enter a final decision. But this argument ignores the significance of the duties and discretion that special trial judges possess. The office of special trial judge is "established by Law," Art. II, § 2, cl. 2, and the duties, salary, and means of appointment for that office are specified by statute. See Burnap v. United States, 252 U.S. 512, 516-517, 64 L. Ed. 692, 40 S. Ct. 374 (1920); United States v. Germaine, 99 U.S. 508, 511-512, 25 L. Ed. 482 (1879). These characteristics distinguish special trial judges from special masters, who are hired by Article III courts on a temporary, episodic basis, whose positions are not established by law, and whose duties and functions are not delineated in a statute. Furthermore, special trial judges perform more than ministerial tasks. They take testimony, conduct trials, rule on the admissibility of evidence, and have the power to enforce compliance with discovery orders. In the course of carrying out these important functions, the special trial judges exercise significant discretion.

Even if the duties of special trial judges under subsection (b)(4) were not as significant as we and the two courts have found them to be, our conclusion would be unchanged. Under §§7443A(b)(1), (2), and (3), and (c)), the Chief Judge may assign special trial judges to render the decisions of the Tax Court in declaratory judgment proceedings and limited-amount tax cases. The Commissioner concedes that in cases governed by subsections (b)(1), (2), and (3), special trial judges act as inferior officers who exercise independent

> authority. But the Commissioner urges that petitioners may not rely on the extensive power wielded by the special trial judges in declaratory judgment proceedings and limited-amount tax cases because petitioners lack standing to assert the rights of taxpayers whose cases are assigned to special trial judges under subsections (b)(1), (2), and (3).
>
> This standing argument seems to us to be beside the point. Special trial judges are not inferior officers for purposes of some of their duties under §7443A, but mere employees with respect to other responsibilities. The fact that an inferior officer on occasion performs duties that may be performed by an employee not subject to the Appointments Clause does not transform his status under the Constitution. If a special trial judge is an inferior officer for purposes of subsections (b)(1), (2), and (3), he is an inferior officer within the meaning of the Appointments Clause and he must be properly appointed. *Freytag*, 501 U.S. at 880-882, 111 S.Ct. at 2640-2641.

In *Freytag* the Supreme Court cited nine factors for determining whether a Tax Court Special Trial Judge is an "Officer of the United States" under the Appointments Clause. Under these tests, an IRS Appeals Officer meets all but nonessential criteria.

Position "established by Law": Both the positions of Tax Court Special Trial Judge and Appeals Officers are mentioned in the Code and given duties to perform. The DOJ Opinion, after analyzing much authority (including *Freytag*) states: "a position, however labeled, is in fact a federal office if (1) it is invested by legal authority with a portion of the sovereign powers of the federal Government, and (2) it is 'continuing'."

Statutory duties: Tax Court Special Trial Judges and Appeals personnel holding CDP hearings are both

given substantially similar duties that can only be exercised by an Officer. Although Special Trial Judges were limited to cases ($10,000 and below) in the types of taxes as to which the Tax Court had deficiency jurisdiction, IRS Appeals Officers have much more power, in that they can make rulings without limit to (1) the amount in dispute (potentially, billions of dollars) or (2) the type of tax --e.g., they can rule on underlying liability for employment taxes that the Tax Court did not have any jurisdiction to hear when *Freytag* was decided.

Discretion: *Freytag* points to discretion as a factor indicative of "Officer" status under the Appointments Clause. According to the Supreme Court, Tax Court Special Trial Judges have discretion. By providing the Appeals hearing person in the CDP proceeding with the obligation to "take into consideration" both the issues that can be raised in such a hearing (including "offers of collection alternatives") and "whether any proposed collection action balances the need for the efficient collection of taxes with the legitimate concern of the person that any collection action be no more intrusive than necessary", Congress has clearly given the Appeals personnel considerable discretion. Further, except as to underlying liability determinations and spousal liability determinations under section 6015, Tax Court review of a notice of determination issued by such an Appeals person is done under an "abuse of discretion" standard of review limited to issues raised at the Appeals hearing. This further proves that Appeals personnel in CDP proceedings have "discretion". Below the Ninth Circuit and Sixth Circuit noted this broad discretion and held that they would give it deference unless it was patently unfair or wrong. *Living Care Alternatives of Utica, Inc v. U.S.*.411 F.3d 621 (6th Cir. 2005). Even after a court decision, the Appeals Office retains jurisdiction to reconsider its prior decision due to changed circumstances. 26 U.S.C.6330(d)(2).

Ability to enter final decision: Tax Court Special Trial Judges had the ability to enter the decision of the Tax Court in declaratory judgment and certain

small-dollar deficiency proceedings. Notices of determination issued by Appeals personnel after CDP hearings are final and binding on the IRS and taxpayers, but can be appealed by taxpayers to the Tax Court.67 Although Section 6330(d))(2) rehearings are possible, below the Commissioner stated its procedure was only to provide such a hearing if a new offer was filed. The Commissioner stated petitioners' options were either appeal to the Ninth Circuit or a new offer. Appeal can only be taken from a final judgment.

Salary: The Internal Revenue Code provides that Special Trial Judges are paid 90% of the salary of a regular, Presidentially-appointed Tax Court judge. There is no provision in any statue specifically stating how much is paid to Appeals Officers, Settlement Officers, or Appeals Team Managers. However, the Appeals personnel are compensated Civil Service employees. As the DOJ Opinion points out, "an emolument is also a common characteristic of an office, . . .but it too is not essential."

Means of appointment: The Internal Revenue Code sets out the means of appointment of a Special Trial Judge: He or she is appointed by the Chief Judge of the Tax Court. By contrast, no law specifically states how an Appeals Officer, Settlement Officer, or Appeals Team Manager is hired or appointed. But that does not mean that the latter personnel need not be appointed pursuant to the Appointments Clause. It merely means that, if those persons are "Officers" within the meaning of the Clause, they must be appointed by the President with the advice and consent of the Senate. As to the issue of whether the lack of a statutory provision for "appointment" means that a government employee is not an "Officer" under the Appointments Clause, the DOJ Opinion states:

It is true that an individual not properly appointed under the Appointments Clause cannot technically be an officer of the United States . . . . But such a person may nevertheless be required to be appointed as prescribed by the Clause in order constitutionally to exercise his authority. A contrary conclusion would render the Appointments Clause a matter of etiquette

or protocol, rather than one of the "significant structural safeguards of the constitutional scheme[.]" . . . . Under such a (tautological) reading, the Clause would require a certain means of appointment only for persons appointed by that means.

Continuity of position: Neither Tax Court Special Trial Judges nor Appeals personnel conducting CDP proceedings are temporary government workers.

Powers to take testimony, conduct trials, and rule on admissibility of evidence: Under the rules of the Tax Court, any judge, including a Special Trial Judge, can conduct a trial at which he or she takes testimony and rules on admissibility of evidence. At a CDP hearing, the holder of the hearing can accept testimony and decide what weight to give to any evidence presented. The Federal Rules of Evidence do not apply, as this is an informal administrative proceeding.

Power to enforce compliance with discovery orders: A Tax Court Special Trial Judge has the power to enforce compliance with discovery orders. By contrast, a taxpayer does not have the right to do discovery of the IRS in the course of a CDP hearing at Appeals. This is not an essential element. In *Buckley v. Valeo*, the Supreme Court held that the FEC's power to issue advisory opinions on submitted proposed actions was a power that could only be held by an "Officer", yet there is no discovery in an advisory opinion ruling, either.

II. This Court Should Advise a Uniform Rule for the Tax Court Introduction of Evidence Where the Standard is Abuse of Discretion.

A. This Case Squarely Demonstrates The Conflict -- Even Within the Same Circuit

The Tax Court works off a double standard. It requires the *de novo* admission of evidence never presented to an Appeals Officer to determine whether he abused his discretion the year before. The Eighth Circuit prohibited the Tax Court from this approach,

limiting its review to the administrative record. *Robinette v CIR*, 439 F.3d 455 (8th Cir. 2006). The First Circuit adopted the Eighth Circuit's record review limitation. *Murphy v. CIR*, 469 F.3d 27, 31 (1st Cir. 2006). Although the Ninth Circuit, declined to reach the record rule here, one week later another Ninth Circuit panel did so, adopting the Robinette rule as the law in the Ninth Circuit. *Keller v. CIR*, 568 F.3d 710 (9th Cir. June 3, 2009)

Yet the Tax Court maintains it is not an Article III court and its history allows it to conduct *de novo* trials of evidence.

Inconsistent scope of review arises because under the "Golsen Rule," the Tax Court is bound to apply the law of the circuit to which the case is appealable. *Golsen v. Commissioner*, 54 T.C. 742, 756 (1970) affd. 445 F.2d 985 (10th Cir. 1971).

The Tax Court recently distinguished *Robinette*'s record-only review in Section 6330 (lien/levy) cases from statutory language authorizing *de novo* review in Section 6015 (innocent spouse) cases. See, *Porter v. CIR*, 130 T.C. 10 at *3, 2008 WL 2065189 (May 15, 2008). Section 6015 provides that the Tax Court "determine" relief, suggesting it conduct a trial *de novo*. The Tax Court contrasts this to Section 6330(d) where Congress "chose not to use the word 'determine' or some derivation thereof." The Tax Court stated no inference should be drawn that by distinguishing *Robinette,* it is changing its own position concerning Section 6330 lien/levy cases, i.e. it is not limited to the administrative record. *Porter v. CIR, supra,* at fn. 6. Yet the Tax Court's position in *Robinette* was overruled by the Eighth Circuit, and the First Circuit adopted its reasoning in *Murphy*. If Congress wished the section 6015 "determine" language to appear in section 6330, it could have included it. The Tax Court's ruling in *Porter v. CIR* further illustrates the confusing scenario confronted by Tax Court litigants. The Tax Court estimates 70 percent of such litigants are pro se. If one relies on the First, Eighth, and now Ninth Circuit holdings, but is not in those circuits, he may improperly present his

case to the Tax Court because the procedure fluctuates even within the same circuit.

The Tax Court further maintained in *Ewing II*, the instant case, and in newly decided cases that an unpublished Ninth Circuit "memdispo" affirms its continued practice of allowing at trial documents, records, and testimony never presented at the administrative hearing. See *Ewing v. CIR*, 122 T.C. No. 32 at fn 3, WL 158177 (2004) ("*Ewing II*"); *Oropeza v CIR*, T.C. Memo 2008-94 at *2, 2008 WL 1722003 (April 14, 2008). In a three-quarter page footnote of its *Ewing II* decision, the Tax Court cited two unpublished Ninth Circuit opinions affirming introduction of evidence at trial that was not part of the administration record. *Holliday v. Commissioner*, 57 Fed. Appx 774 (9th Cir. 2003) affg. T.C. Memo 2002-67; *Lindsey v. Commissioner*, 56 Fed. Appx. 802 (9th Cir. 2003) affg. T.C. Memo 2002-

The Ninth Circuit's *Keller* decision overruled the Tax Court's reasoning.

Robinette, Murphy, and Keller create a problem for litigants outside the Eighth, Firth, and Ninth Circuits, because they do not know whether they should present extra record evidence at trial. In *Robinette*, the Tax Court allowed extra record evidence, but the Eighth Circuit overruled the Tax Court, limiting review to the administrative record.

This dilemma poses problems. In a leading opinion, the Tax Court held that where the standard of review is abuse of discretion, "it would be anomalous and improper for us to conclude that respondent's Appeals Office abused its discretion under section 6330(c)(3) in failing to grant relief, or in failing to consider arguments, issues, or other matter not raised by taxpayers or not otherwise brought to the attention of respondent's Appeals Office. *McCoy Enters., Inc. v. Commissioner*, 58 F.3d 557, 563 (10th Cir.1995) ("The Tax Court * * * cannot find an abuse of discretion where there is no evidence that the Commissioner exercised any discretion at all"). *Magana v. CIR*, 118 T.C. No. 30, 118 T.C. 488, 493 (2002).

Magana's same reasoning, by extension, should

apply to the scope of review. To paraphrase *Magana*, it would be anomalous for the Tax Court to find an Appeals Officer abused his discretion based on documents, records and testimony presented at trial which were never presented to the Appeals Officer. Section 6330 already requires that the Appeals Office adequately consider issues raised by a taxpayer at a CDP hearing, and the Commissioner's regulation further requires the taxpayer be allowed a reasonable opportunity to present evidence to support that issue. 26 CFR 301.6330-1(f)(2).

The Tax Court is reviewing for an abuse of discretion. Its scope of review should be limited to supporting evidence that was provided to the Appeals Officer. If the Tax Court were to find abuse of discretion by an Appeals Officer based on new documents, records, and testimony never presented to him, it would be akin to faulting a person for not seeing into the future a year from now and seeing it 100 percent accurately.

The irony of the Tax Court's *de novo* scope of review is it effectively rewards taxpayers who fail to provide evidence to the Appeals Officer by giving them a second bite at the apple when they bypassed their first. The majority of the Tax Court case annotations for section 6330 involve cases where a taxpayer chose not to provide financial information or other supporting evidence requested by the Appeals Officer. *See, e.g., Murphy v. Commissioner*, 469 F.3d 27 (1st Cir 2006) [failure to provide financial and health information to Appeals Officer]; *Etkin v. CIR*, T.C. Memo 2005-245 at *3, 2005 WL 2709505 [failure to provide updated financial information to Appeals Officer].

Here, the reverse is true. The Commissioner admits in his Answer to Amended Petition that Appellants timely responded to all information requests; but denies for lack of knowledge as to the truth of petitioners' allegations that the information was hand delivered. [Answer to Amended Petition, p. 5, ¶ 5(p).] [ER 105] Admissions in a party's answer are judicial admissions and the party is conclusively bound

by them. A judicial admission has the effect of withdrawing the admitted fact from issue and wholly dispensing with the need for proof of the fact. *American Title Insurance Co. v. Lacelaw Corp.*, 861 F.2d 224, 226 (9th Cir. 1988). Indeed, a key issue here is that evidence showing a change in income was faxed to the Appeals Office the same day it was issued, but that evidence was not considered. [ER 309-310].

Allowing evidence to be presented for the first time to the Tax Court would eliminate the Appeals' officer's role and permit the evidence to be reviewed without any prior consideration by any level of the Commissioner's organization. The Tax Court's consideration of such evidence without any prior review by the Commissioner would frustrate the administrative review process created by section 6330. The Tax Court described this exact scenario in a decision requiring presentation of all issues -- not evidence -- to the Appeals Office. "We hold today that we do not have authority to consider section 6330(c)(2) issues that were not raised before the Appeals Office." *Giamelli v. CIR*, 129 T.C. No. 14, 129 T.C. 107, 115 (2007) [holding Estate may not raise underlying tax liability on appeal when underlying tax liability was not properly raised during the collection review hearing before Commissioner's Appeals Office.]

This Tax Court position is akin to the math concept of infinite regression, where it can get closer and closer to a position, but never arrive.

As the *Robinette* court pointed out, there can be unusual circumstances where the completeness of the administrative record is called into question. When that circumstance arises, the reviewing court's role is not to conduct a *de novo* review of the evidence, but correct the record and remand it to the agency to reconsider the omitted material. *Robinette*, *supra*, at 461, citing *Camp v. Pitts*, 411 U.S. 138 at 143, 93 S.Ct. 1241, 36 L.Ed.2d 106 (1973).

The Supreme Court's resolution of the Tax Court's *de novo* acceptance of evidence procedures versus restriction to the record in three Circuits will result in a uniform application of tax laws.

III. The Decision Below is Incorrect

Petitioners have been caught in the crossfire of a raging tax debate that involves the Commissioner stating the *Robinette* record controls, the Tax Court holding it doesn't, and the Ninth Circuit changing views within a week. The Ninth Circuit held that the IRS Appeals Officer's error to not consider new evidence was not prejudicial. In so doing the Court gave additional license to nonappointed judges to not comply with a controlling statute and submit a truncated record to a reviewing court. However, this Court's precedent is that a government actor has no authority to disregard a controlling statute. This Court held that a government actor has no discretion "when a federal statute, regulation, or policy specifically prescribes a course of action. In this event, the [government actor] has no rightful option but to adhere to the directive." *Berkowitz v. U.S.*, 486 U.S. 531, 536 108 S.Ct. 1954, 1959 (1988). The IRS must follow statutory and regulatory criteria in exercising its discretion, and [courts] may review the IRS's decision for an abuse of discretion. *Speltz v. Commissioner*, 454 F.3d 782 (8th Cir. 2006). This Court also held that except in rare circumstances, remand to the agency is appropriate where the record before the agency does not support the agency action or if the agency has not considered all relevant factors. *Florida Power & Light Co. v. Lorion, etc., et al. United States Nuclear Regulatory Commission*, 470 U.S. 729, 744, 105 S.Ct. 1598, 1607 (1985). The Commissioner agreed below.

The Ninth Circuit declined to reach the record rule, a central issue below, though it was urged by the Commissioner, agreed by petitioners and became the circuit's controlling law a week later. *Keller*, *supra*. The Ninth Circuit's holding is contrary to judicial admissions at the May 14, 2007 Tax Court trial when the Tax Court *sua sponte* requested extra record evidence:

> Tax Court: Have you had overtime recently?

> Mr. Cornwell: I've had some, Your Honor, but it's not to the same degree. [Reporter's Transcript, p;. 8:11-13] [ER 144]

A statement of fact made during oral argument or trial is a judicial admission. *U.S. (Commissioner of IRS) v. Bentson*, 947 F.2d 1353, 1356 (9th Cir. 1991).

IV. AMICUS BRIEFS

Several professors around the country specializing in tax law agree that the appointments clause violation should be addressed by this Court. At least one will file an amicus brief to fully inform this Court. Petitioners respectfully request hat these learned amici be allowed to address this Court should review be granted.

CONCLUSION

The petition for writ of certiorari should be granted.

Dated: December 9, 2009

Respectfully submitted,

By /s/
Michael Cornwell
and Hilary J. Iker,
Petitioners
2395 Kenilworth Avenue
Los Angeles, CA 90039
Tel: (323) 663-0345

FILED Aug 27, 2009

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MICHAEL CORNWELL; et al.,	No. 08-71458
Petitioners - Appellants,	Tax Ct. No. 15013-06L
v.	ORDER
COMMISSIONER OF INTERNAL REVENUE,	
Respondent - Appellee	

Before: PREGERSON, CANBY and BERZON, Circuit Judges

Cornwell and Iker's petition for panel rehearing is denied.

No further filings shall be accepted in this closed case.

FILED May 26, 2009

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MICHAEL CORNWELL; et al.,	) No. 08-71458
Petitioners - Appellants,	) Tax Ct. No. 15013-06L
v.	)
COMMISSIONER OF INTERNAL REVENUE,	)
Respondent - Appellee	)

MEMORANDUM

Appeal from a Decision of the United States Tax Court

Before: PREGERSON, CANBY and BERZON, Circuit Judges

Submitted May 12, 2009.[FN*]

FN* The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R.App. P. 34(a)(2).

FN** This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

Michael D. Cornwell and Hilary J. Iker appeal pro se from the tax court's decision, after a bench trial, upholding the Internal Revenue Service's determinations to collect by levy unpaid federal income taxes for 2002 and to file federal tax liens for unpaid taxes for 1994-2002. We have jurisdiction under 26 U.S.C. § 7482(a)(1). We review the tax court's decision

de novo. *Johanson v. Comm'r*, 541 F.3d 973, 976 (9th Cir.2008). We affirm.

The Commissioner's failure to consider appellants' July 2006 faxes, even if in error, was not prejudicial, and therefore does not constitute grounds for reversal. *See Vt. Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 558, 98 S.Ct. 1197, 55 L.Ed.2d 460 (1978) (administrative decisions should not be set aside absent prejudicial error); *see also* 26 U.S.C. § 6330(d)(2) (authorizing subsequent hearings to address a taxpayer's "change in circumstances").

The Commissioner's response to appellants' May 30, 2006 correspondence was not an abuse of discretion because appellants raised arguments that the Commissioner had previously considered. *See Fargo v. Comm'r*, 447 F.3d 706, 709 (9th Cir.2006) (reviewing Commissioner's actions for abuse of discretion).

The Commissioner did not abuse his discretion by calculating a reasonable collection potential based on Cornwell's past income because appellants failed to present persuasive evidence that Cornwell's overtime had declined, or would decline in the future. *See id.*

We do not reach appellants' contention that the administrative record rule applies to tax court proceedings under 26 U.S.C. § 6330 because the tax court did not consider evidence outside the administrative record in this case.

Appellants' remaining contentions are unpersuasive.

Appellants' request for judicial notice is granted.

AFFIRMED.

UNITED STATES TAX COURT

MICHAEL CORNWELL; et al.,	)	
	)	
Petitioners,	)	Case No. 15013-06L
	)	
v.	)	
	)	
COMMISSIONER OF INTERNAL REVENUE,	)	
	)	
Respondent	)	

FILED SEPTEMBER 27, 2007

MEMORANDUM OPINION

COHEN, Judge.

This proceeding was commenced in response to three Notices of Determination Concerning Collection Action(s). The issue for decision is whether the settlement officer abused his discretion in determining the amount of an acceptable offer-in-compromise (OIC) by including prior overtime earnings in the calculation of reasonable collection potential (RCP). Unless otherwise indicated, all section references are to the Internal Revenue Code, as amended.

Background

All of the facts have been stipulated, and the stipulated facts are incorporated as our findings by this reference. Petitioners resided in California at the time that their petition was filed. Petitioner Michael D. Cornwell (petitioner) is and for many years has been employed

as a legal assistant at a law firm.

For tax years 1994 through 1996, petitioner filed Forms 1040, U.S. Individual Income Tax Return, but failed to pay the amounts shown as tax due on those returns. For 1997 through 2002, petitioners filed joint Federal income tax returns but did not pay the balances due on those returns.

On October 20, 2003, the Internal Revenue Service (IRS) sent to petitioner a Notice of Federal Tax Lien Filing and Your Right to a Hearing Under IRC 6320, advising petitioner that a Notice of Federal Tax Lien had been filed with respect to his unpaid liabilities for 1994, 1995, and 1996. (The parties' stipulation of facts and respondent's brief erroneously set forth the date as October 20, 2004.)

On October 24, 2003, the IRS sent to petitioners a Notice of Federal Tax Lien Filing and Your Right to a Hearing Under IRC 6320, advising petitioners that a Notice of Federal Tax Lien had been filed with respect to their joint unpaid liabilities for 1997 through 2002.

On November 24, 2003, the IRS received from petitioners a Form 12153, Request for Collection Due Process Hearing, signed by petitioners and dated November 19, 2003, with respect to the notices sent October 20 and October 24, 2003.

On July 2, 2004, the IRS sent to petitioner a Final Notice of Intent to Levy and Notice of Your Right to a Hearing, advising petitioner that respondent intended to levy to collect unpaid liabilities for 2002. On July 29, 2004, petitioners filed a Form 12153 with respect to the July 2, 2004, notice. The July 29, 2004, request for hearing included the following paragraph:

This hearing request may be moot as IRS advises Final Notice of Levy was mistakenly issued. See attached Letter 3212 dated 7/15/04.

HOWEVER, out of caution, we are submitting the hearing request. The basis of the hearing request is that the Final Notice was incorrectly issued as an Offer In Compromise concerning this tax period is and has been pending. A pending OIC prohibits issuance of a levy.

A July 15, 2004, letter to petitioner from the IRS stated:

> We're sorry that we made a mistake in recently sending you a Notice of Intent to Levy and Notice of Your Right to a Hearing, dated July 2, 2004. The letter advised you that we would take collection action if you did not pay the amount of tax you owe or ask for a Collection Due Process (CDP) Hearing within 30 days. Because we do not intend to take levy or seizure action against you at this time, we are rescinding the Notice of Intent to Levy.
>
> By law, you are entitled to only one CDP Hearing under Internal Revenue Code Section 6330 for the unpaid taxes listed in our Notice of Intent to Levy. This letter preserves your right to a future CDP hearing should that become necessary. You don't need to do anything further regarding this request. * * *

The law entitles you to a CDP Hearing, but the hearing would take place after the levy or seizure.

The IRS later advised petitioners that the July 15, 2004, letter rescinding the notice of levy was issued in error.

On May 6, 2005, petitioners and respondent's Settlement Officer, Patrick S. Lin (Lin), had a

face-to-face meeting to discuss petitioners' hearing requests. During the meeting, petitioners expressed their intent to submit an OIC to settle their respective tax liabilities for 1994 through 2002.
After the face-to-face meeting, on July 27, 2005, petitioners filed two separate OICs. The first offered to compromise petitioner's individual 1994 through 1996 tax liabilities for $4,000. The second offered to compromise petitioners' joint 1997 through 2002 tax liabilities for $16,000. Subsequently, petitioners filed amended OICs and increased the amounts of the offers to: (1) $6,250 for petitioner's separate tax liabilities for 1989, 1993, 1994, 1995, and 1996 and (2) $18,500 for petitioners' 1997 through 2002 joint tax liabilities (for a total offer of $24,750).

On April 21, 2006, Lin sent to petitioners a letter summarizing his work on petitioners' income and expense table for the purpose of calculating the RCP. At that time, based on the information received from petitioners, the RCP was calculated to be $81,456. Lin further informed petitioners that, unless he received an amended OIC offering at least that amount, the OIC would be rejected.

On May 4, 2006, petitioners sent to Lin a letter stating the grounds for their objection to the inclusion of overtime pay in calculating their future income for the purposes of determining the RCP. The letter stated, in bold print, that "My firm has a written policy that overtime is not permitted unless expressly authorized in advance by a supervisor." Petitioner enclosed a copy of an Office Handbook issued May 2004 that supported petitioner's assertion. Petitioners asserted that, pursuant to an enclosed economics publication, it is incorrect for petitioner's overtime pay to be included in their future income calculations, because overtime may not continue in the future. Further, petitioners provided more information related to petitioner wife's employment status and her student debt loan.

On May 19, 2006, Lin sent to petitioners a letter responding to their objection to the inclusion of overtime pay in future income. The letter stated that Lin appreciated petitioner's arguments in objecting to the inclusion of overtime pay in future income, but he noted that 1 Administration, Internal Revenue Manual (CCH), section 5.5.5.5, at 16,339-7, provides a guideline to compute future income. The cited section provides for adjustments when income is expected to increase or decrease. After considering that overtime pay would result in variable income, Lin decided to average petitioner's most recent 5 years of income to calculate future income. The calculations are set forth below:

Period	Adjusted Gross Income
2001	$98,315.00
2002	100,392.00
2003	100,203.00
2004	100,297.00
2005	107,024.00

Total 506,231.00

Average (annual) 101,246.20

Average monthly 8,437.18

Lin further explained that, based on this revised figure for future income, the RCP was now $56,976. The letter reminded petitioners that Lin would be rejecting their OICs if they did not amend their offer to at least pay the RCP.

In a letter dated May 30, 2006, petitioner mailed the declaration of Dr. Joyce Pickersgill, a forensic economist, to support petitioners' position that overtime pay should be excluded entirely when calculating future income for the purpose of computing the RCP. Petitioner again referred to "a recent change in the overtime pay policy of my employer."

After reviewing the correspondence, Lin made a determination to permit the collection action to proceed. On June 26, 2006, he sent three separate Appeals Case Memorandums, delineating the facts and reasons underlying his decision, for managerial approval. As of that time, petitioners owed approximately $84,000 for the years in issue.

After managerial approval, the Appeals Case Memorandums were incorporated into three separate notices of determination: (1) Notice of determination for levy for 2002 taxes dated July 7, 2006; (2) notice of determination for lien for 1997 through 2002 taxes dated July 14, 2006; and (3) notice of determination for lien for 1994 through 1996 taxes dated July 14, 2006.

After Lin's June 26, 2006, Appeals Case Memorandums and prior to the issuance of the notices of determination, petitioner sent two faxes to Lin. Each fax attached a copy of an email dated July 5, 2006, referring to overtime at the law firm where petitioner was employed. The email stated:

> After assessing the current work load in the firm, it has been determined that no overtime is necessary at this time for support staff.
>
> If something changes in your work load which would

require a necessity for overtime, you will need to have approval from your supervisor in *advance.*

Discussion

Petitioners invoke our jurisdiction under section 6330(d) to review the three notices of determination described above. (The petition erroneously alleged that both petitioners appealed all three notices, but only petitioner husband is the recipient of the October 20, 2003, notice of lien and the July 2, 2004, notice of levy and of the determinations relating to those notices.) Their challenge to the notices is that the settlement officer abused his discretion in requiring an increased OIC of their outstanding liabilities.

Petitioners contend, among other things, that the notices of determination sustaining two liens and a levy were an abuse of discretion because the settlement officer failed to consider evidence of "changed circumstances" presented by petitioners before the notices of determination were issued and "in choosing to not further investigate this change of circumstance caused by a new overtime policy change". Respondent contends that the faxes sent in July 2006 merely reiterated the employer's policy in effect in 2004 and that the settlement officer considered that policy in adjusting the amount of an acceptable OIC based on averaging petitioner's earnings for the prior 5 years of his employment.

The review applicable in cases such as this one was stated in *Murphy v. Commissioner*, 125 T.C. 301, 320, 2005 WL 3555953 (2005), affd. 469 F.3d 27 (1st Cir.2006), as follows:

We do not conduct an independent review of what

would be an acceptable offer in compromise. *Fowler v. Commissioner*, T.C. Memo.2004-163. The extent of our review is to determine whether the Appeals officer's decision to reject the offer in compromise actually submitted by the taxpayer was arbitrary, capricious, or without sound basis in fact or law. *Skrizowski v. Commissioner*, T.C. Memo.2004-229; *Fowler v. Commissioner, supra;* see *Woodral v. Commissioner*, 112 T.C. 19, 23, 1999 WL 9947 (1999).

The proposals presented to Settlement Officer Lin were for less than $25,000 against total liabilities approximating $84,000 as of June 2006. Petitioners' proposals were rejected by the settlement officer, who calculated an acceptable offer by reference to petitioner's actual earning history, in accordance with the Internal Revenue Manual. Petitioners then suggested that overtime pay that had been consistently earned by petitioner should be excluded from the calculation altogether. That suggestion does not appear to be reasonable, because petitioner continued to receive overtime pay notwithstanding his employer's policy. Petitioners never offered any evidence that petitioner's actual earnings were declining as a result of the 2004 or allegedly "new" in 2006 overtime policy.

Petitioners argue that the settlement officer should have conducted a further investigation before sending the notices of determination. Respondent points out that the negotiations over petitioners' long delinquent tax liabilities had gone on for years and that reasonable deadlines had been set and had passed when the notices of determination were sent. See *Murphy v. Commissioner, supra* at 322-323.

Respondent declined an opportunity at the time for trial to cross-examine petitioner or representatives of his employer about the effect of the allegedly new policy, apparently because respondent maintains the

position that nothing may be considered outside of the administrative record made before the settlement officer. Petitioners did not attempt to introduce any evidence concerning the actual effect of the allegedly new policy, which had purportedly been in effect 10 months as of the time set for trial in May 2007 and presumably would have been reflected in petitioner's 2006 or current compensation. Thus we need not decide whether to reconsider our position as to evidence first presented at trial. See *Murphy v. Commissioner, supra* at 311-312; *Robinette v. Commissioner*, 123 T.C. 85, 94-101, 2004 WL 1616381 (2004), revd. 439 F.3d 455 (8th Cir.2006).

Because petitioners' proposed OIC was not supported by evidence of petitioner's actual current or future earning potential, we cannot conclude that the settlement officer's rejection of their offer was arbitrary, capricious, or without sound basis in fact or law. The settlement officer's computation of what would be acceptable reflected actual earnings that have not been shown to be unreliable as an indicator of future earnings, because the claim that the employer's policy would reduce petitioner's earnings is merely speculation. Petitioners failed to show that the allegedly new overtime policy had an effect on petitioner's actual earnings and constituted a change of circumstances. Thus they have not shown that the settlement officer's further investigation would have made a difference. We cannot conclude that sustaining the liens and the proposed levy was an abuse of discretion.

We have considered the other arguments of the parties. They are moot, irrelevant, or lacking in merit.

Decision will be entered for respondent.

I.R.C. § 6320

Effective: December 20, 2006

Subtitle F. Procedure and Administration (Refs & Annos)
Chapter 64. Collection
Subchapter C. Lien for Taxes
Part I. Due Process for Liens (Refs & Annos)
→ 26 U.S.C. § 6320. Notice and opportunity for hearing upon filing of notice of lien.

(a) Requirement of notice.--

(1) In general.--The Secretary shall notify in writing the person described in section 6321 of the filing of a notice of lien under section 6323.

(2) Time and method for notice.--The notice required under paragraph (1) shall be--

(A) given in person;

(B) left at the dwelling or usual place of business of such person; or

(C) sent by certified or registered mail to such person's last known address,

not more than 5 business days after the day of the filing of the notice of lien.

(3) Information included with notice.--The notice

required under paragraph (1) shall include in simple and nontechnical terms--

(A) the amount of unpaid tax;

(B) the right of the person to request a hearing during the 30-day period beginning on the day after the 5-day period described in paragraph (2);

(C) the administrative appeals available to the taxpayer with respect to such lien and the procedures relating to such appeals; and

(D) the provisions of this title and procedures relating to the release of liens on property.

(b) **Right to fair hearing.**--

(1) **In general.**--If the person requests a hearing in writing under subsection (a)(3)(B) and states the grounds for the requested hearing, such hearing shall be held by the Internal Revenue Service Office of Appeals.

(2) **One hearing per period.**--A person shall be entitled to only one hearing under this section with respect to the taxable period to which the unpaid tax specified in subsection (a)(3)(A) relates.

(3) **Impartial officer.**--The hearing under this subsection shall be conducted by an officer or employee who has had no prior involvement with respect to the unpaid tax specified in subsection (a)(3)(A) before the first hearing under this section or

section 6330. A taxpayer may waive the requirement of this paragraph.

(4) **Coordination with section 6330.**--To the extent practicable, a hearing under this section shall be held in conjunction with a hearing under section 6330.

(c) **Conduct of hearing; review; suspensions.**--For purposes of this section, subsections (c), (d) (other than paragraph (2)(B) thereof), (e), and (g) of section 6330 shall apply.

Effective: August 17, 2006

United States Code Annotated Currentness
Title 26. Internal Revenue Code (Refs & Annos)
Subtitle F. Procedure and Administration (Refs & Annos)
Chapter 64. Collection
Subchapter D. Seizure of Property for Collection of Taxes
Part I. Due Process for Collections

➡§ 6330. Notice and opportunity for hearing before levy

(a) Requirement of notice before levy.--

(1) In general.--No levy may be made on any property or right to property of any person unless the Secretary has notified such person in writing of their right to a hearing under this section before such levy is made. Such notice shall be required only once for the taxable period to which the unpaid tax specified in paragraph (3)(A) relates.

(2) Time and method for notice.--The notice required under paragraph (1) shall be--

(A) given in person;

(B) left at the dwelling or usual place of business of such person; or

(C) sent by certified or registered mail, return receipt requested, to such person's last known address;

not less than 30 days before the day of the first levy with respect to the amount of the unpaid tax for the taxable period.

(3) Information included with notice.--The notice required under paragraph (1) shall include in simple and nontechnical terms--

(A) the amount of unpaid tax;

(B) the right of the person to request a hearing during the 30-day period under paragraph (2); and

(C) the proposed action by the Secretary and the rights of the person with respect to such action, including a brief statement which sets forth--

(i) the provisions of this title relating to levy and sale of property;

(ii) the procedures applicable to the levy and sale of property under this title;

(iii) the administrative appeals available to the taxpayer with respect to such levy and sale and the procedures relating to such appeals;

(iv) the alternatives available to taxpayers which could prevent levy on property (including installment agreements under section 6159); and

(v) the provisions of this title and procedures relating to redemption of property and release of liens on property.

(b) Right to fair hearing.--

(1) In general.--If the person requests a hearing under subsection (a)(3)(B), such hearing shall be held by the Internal Revenue Service Office of Appeals.

(2) One hearing per period.--A person shall be entitled to only one hearing under this section with respect to the taxable period to which the unpaid tax specified in subsection (a)(3)(A) relates.

(3) **Impartial officer.**--The hearing under this subsection shall be conducted by an officer or employee who has had no prior involvement with respect to the unpaid tax specified in subsection (a)(3)(A) before the first hearing under this section or section 6320. A taxpayer may waive the requirement of this paragraph.

(c) **Matters considered at hearing.**--In the case of any hearing conducted under this section--

(1) **Requirement of investigation.**--The appeals officer shall at the hearing obtain verification from the Secretary that the requirements of any applicable law or administrative procedure have been met.

(2) **Issues at hearing.**--

(A) **In general.**--The person may raise at the hearing any relevant issue relating to the unpaid tax or the proposed levy, including--

(i) appropriate spousal defenses;

(ii) challenges to the appropriateness of collection actions; and

(iii) offers of collection alternatives, which may include the posting of a bond, the substitution of other assets, an installment agreement, or an offer-in-compromise.

(B) **Underlying liability.**--The person may also raise at the hearing challenges to the existence or amount of the underlying tax liability for any tax period if the person did not receive any statutory notice of deficiency for such tax liability or did not otherwise have an opportunity to dispute such tax liability.

(3) **Basis for the determination.**--The determination by an appeals officer under this subsection shall take

into consideration--

(A) the verification presented under paragraph (1);

(B) the issues raised under paragraph (2); and

(C) whether any proposed collection action balances the need for the efficient collection of taxes with the legitimate concern of the person that any collection action be no more intrusive than necessary.

(4) **Certain issues precluded.**--An issue may not be raised at the hearing if--

(A) the issue was raised and considered at a previous hearing under section 6320 or in any other previous administrative or judicial proceeding; and

(B) the person seeking to raise the issue participated meaningfully in such hearing or proceeding.

This paragraph shall not apply to any issue with respect to which subsection (d)(2)(B) applies.

(d) **Proceeding after hearing.**--

(1) **Judicial review of determination.**--The person may, within 30 days of a determination under this section, appeal such determination to the Tax Court (and the Tax Court shall have jurisdiction with respect to such matter).

(2) **Jurisdiction retained at IRS Office of Appeals.**--The Internal Revenue Service Office of Appeals shall retain jurisdiction with respect to any determination made under this section, including subsequent hearings requested by the person who requested the original hearing on issues regarding--

(A) collection actions taken or proposed with respect to such determination; and

(B) after the person has exhausted all administrative remedies, a change in circumstances with respect to such person which affects such determination.

(e) **Suspension of collections and statute of limitations.**--

(1) **In general.**--Except as provided in paragraph (2), if a hearing is requested under subsection (a)(3)(B), the levy actions which are the subject of the requested hearing and the running of any period of limitations under section 6502 (relating to collection after assessment), section 6531 (relating to criminal prosecutions), or section 6532 (relating to other suits) shall be suspended for the period during which such hearing, and appeals therein, are pending. In no event shall any such period expire before the 90th day after the day on which there is a final determination in such hearing. Notwithstanding the provisions of section 7421(a), the beginning of a levy or proceeding during the time the suspension under this paragraph is in force may be enjoined by a proceeding in the proper court, including the Tax Court. The Tax Court shall have no jurisdiction under this paragraph to enjoin any action or proceeding unless a timely appeal has been filed under subsection (d)(1) and then only in respect of the unpaid tax or proposed levy to which the determination being appealed relates.

(2) **Levy upon appeal.**--Paragraph (1) shall not apply to a levy action while an appeal is pending if the underlying tax liability is not at issue in the appeal and the court determines that the Secretary has shown good cause not to suspend the levy.

(f) **Jeopardy and state refund collection.**--If--

(1) the Secretary has made a finding under the last sentence of section 6331(a) that the collection of tax is in jeopardy; or

(2) the Secretary has served a levy on a State to collect a Federal tax liability from a State tax refund,

this section shall not apply, except that the taxpayer shall be given the opportunity for the hearing described in this section within a reasonable period of time after the levy.

UNITED STATES TAX COURT

LARRY E. TUCKER Petitinoner, v.s No. 3165-06L COMMSISSIONER OF INTERNAL REVENUE Respondent	) Docket)

ANSWER TO SECOND AMENDMENT TO PETITION

RESPONDENT, in answer to the second amended petition filed in the above-entitled-case, admits and alleges as follows:

6. (i) Denies respondent erred; alleges that neither Settlement Officers Carol Berger and Shari Gropack , nor Appeals Team Manager Jonh O'Dea are Officers of the the United States within the meaning of the Appointments Clause of the Constitution.

6. [sic] (f) through (j) . Admits but alleges that Appeals Officers, Settlement Officers and Appeals

Team Managers are persons authorized under I.RC. § 6320(b)(3) and §§ 6330(b)(3) to conduct collection due process hearings. and make a determination.

UNITED STATES TAX COURT

MICHAEL D. CORNWELL and HILARY J. IKER,

Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Docket No.: 15013-06L

FIRST AMENDED PETITION FOR LIEN AND LEVACTION UNDER CODE SECTION 6330(d)

Jurisdiction and Nature of Action

1. Pursuant to Title 26, United States Code Section 6330(d), the United States Tax Court has jurisdiction to review rejection of Offers In Compromise submitted in a Collection Due Process hearing by the Internal Revenue Service. Section 6330(d) is a jurisdictional statute. This action was timely filed within 30 days of the date of denial as required by 26 U.S.C. § 6330(d).

The Parties

2. Petitioners Michael Cornwell and Hilary

J. Iker are taxpayers who submitted the rejected Offers In Compromise. Petitioners are individuals whose mailing address and legal residence is presently 2395 Kenilworth Avenue, Los Angeles, California 90039. Mr. Cornwell's social security number is 585-06-1163. Ms. Iker's social security number is 107-60-2134.

3. Respondent is Commissioner of the Internal Revenue Service whose Settlement Officer rejected said Offers In Compromise.

Claims for Relief

4. This action arises from three Notices of Determination Concerning Collection Action(s) Under Section 6320 and/or 6330 dated July 7, 2006 and July 14, 2006 by the Appeals Office of the Internal Revenue Service at Los Angeles, California. A copy of said Determinations are attached hereto as Exhibit "A". For Petitioner Michael Cornwell individually, the Determination involves tax years 1994-1996, unpaid assessed income tax of $12,704.50, which amount has increased to $23,418.40. For Petitioners Michael Cornwell and Hilary Iker, jointly, the Determination

involves tax years 1997-2002, unpaid assessed income tax of $40,082.66, which amount has increased to $61,228.85. Petitioners attempted to resolve their tax liability through Offers In Compromise in the amount of $24,750. The Offers were based on (1) doubt as to collectability, and (2) special circumstances. IRS calculated the acceptable offer amount to be $56,976 and rejected Petitioners' Offers In Compromise.

5. The Commissioner erred in his computation of the reasonable collection potential for acceptable Offers In Compromise, resulting in denial of the offers submitted by Petitioners. The Commissioner erred by, among other things:

a. The Commissioner also erred by failing to properly consider Petitioners' evidence of changed circumstances faxed to the Settlement Officer July 5, 2006 and July 11, 2006.

b. Failing to properly consider a change in circumstances in Petitioner Michael Cornwell's employment.

c. Failing to differentiate overtime

pay from normal pay in the computation of Petitioner Michael Cornwell's future income.

d. Failing to consider notifications from Petitioner Michael Cornwell's employer that future overtime would be unnecessary.

e. Rejecting a sworn declaration by forensic economist Joyce Pickersgill, Ph.D. concerning IRS' flawed method used to calculate amount of acceptable Offers In Compromise.

f. Failing to correctly apply Internal Revenue Manual guidelines in the computation of the reasonable collection potential for acceptable Offers In Compromise.

g. Determining that Petitioners' letter of May 30, 2006, suggesting flaw in calculation of acceptable offer amount and inviting recalculation, "revoked" IRS' counter offer of May 19, 2006.

h. Determining that Petitioners "failed to provide a feasible alternative to resolve their tax liabilities" when the Settlement Officer's last communication to Petitioners did not request an

alternative be provided or state that he would recommend rejection of the pending Offer In Compromise.

i. The Commissioner also erred by failing to consider the additional special circumstances grounds presented here for acceptance of the Offers In Compromise i.e., Petitioner Michael Cornwell's permanently disabled and deteriorating right hand.

j. The Commissioner also erred by failing to continue its investigation of Petitioners' Offer in light of said changed circumstances.

k. The Commissioner also erred by failing to reconsider the July 7, 2006 Notice of Determination pursaunt to Petitioners' fax request of July 11, 2006.

l. The Commissioner also erred by failing to include Petitioners' faxes of July 5, 2006 and July 11, 2006 as part of the administrative record for review. These letters were faxed to the Settlement Officer three times.

m. The Commissioner erred by failing

to properly balance the equities between effective tax collection and that collection be no more intrusive than required.

6. The Commissioner's determinations were arbitrary, capricious, an abuse of discretion, not in accordance with law, and not supported by evidence.

7. The facts on which Petitioners rely, as the basis of their case, include:

a. On May 4, 2006, Petitioner Michael Cornwell provided the Settlement Officer with a breakdown of his income for the prior three years, broken down by regular pay and overtime pay.

b. On May 4, 2006, Petitioner Michael Cornwell provided the Settlement Officer with a communication from his employer stating that overtime is restricted.

c. On May 30, 2006, Petitioner Michael Cornwell provided the Settlement Officer with a sworn declaration by forensic economist Joyce Pickersgill, Ph.D., her curriculum vitae, and supporting exhibits.

d. Dr. Pickersgill's declaration states that overtime pay increased Cornwell's income 34 percent in 2003, 43 percent in 2004, and 41 percent in 2005.

e. Dr. Pickersgill's declaration states that given the overtime policy change by Cornwell's employer, a future income projection that does not take this intervening event into account is seriously flawed. Such a projection will overstate Mr. Cornwell's income by 34 to 43 percent if he is unable to earn overtime in the future.

f. Dr. Pickersgill's declaration states a projection of Mr. Cornwell's income, based on a past average of his total earnings, which simply assumes overtime pay will continue into the future, is flawed and would not be considered a reliable estimate of future earnings by forensic economists.

g. Dr. Pickersgill's declaration states that a more reliable method for projecting Mr. Cornwell's future income would be to average regular pay for the last five years.

h. On May 30, 2006, Petitioners provided the Settlement Officer with IRS Manual § 5.8.5.5 which states that income average is not a correct procedure where there has been an intervening change in future income. That is the first example given in the Manual. Income averaging under § 5.8.5.5 was procedure used by the Settlement Officer.

i. On July 5, 2006, Petitioner Cornwell faxed to the Settlement Officer an email communication from his employer indicating future overtime would be unnecessary for his position.

j. On July 11, 2006, Petitioner Cornwell faxed to the Settlement Officer a letter requesting reconsider of the July 7, 2006 Notice of Determination. The letter enclosed the previous faxed July 5, 2006 communication from his employer indicating future overtime would be unnecessary for his position.

k. Petitioner Cornwell's letter of May 30, 2006 does not state it intends to "revoke" IRS' $56,976 counter offer of May 19, 2006, or state an

impasse exists, or terminate further proceedings. The letter stated that the counter offer amount should be recalculated as it was flawed based on the Declaration of Dr. Pickersgill and IRS Manual § 5.8.5.5.

l. For special circumstances consideration, Petitioner Michael Cornwell produced evidence that most of his right hand was permanently frozen as a result of injuries suffered in a 1987 automobile accident. The injuries required four surgeries, including skin grafting, internal fracture repair, and insertion of numerous internal fixation devices. Physicians have advised Cornwell his right hand will likely deteriorate over time and fingers may require amputation. At an in-person meeting on May 26, 2005, at the request of the Settlement Officer, Cornwell showed his right hand and described its history.

m. Settlement Officer's June 14, 2006 letter, his final communication before Notices of Determination were issued, does not request "a feasible alternative to resolve. . .tax liabilities" or state

that he would recommend rejection of the pending Offers In Compromise.

n. Respondent's counsel stated on April 12, 2007 that Petitioner's faxes dated July 5, 2006 and July 11, 2007 were not part of the administrative record.

o. Respondent's recently submitted reconsideration motion for summary judgment states Respondent does not contest the faxes of July 5, 2006 and July 11, 2006 were actually sent on those dates and does not contest the accuracy of the statements made in said faxes.

p. Petitioners have timely responded to all information requests by the Settlement Officer's deadlines, often by hand delivery of such information and records.

Prayer for Relief

Wherefore, Petitioners pray this Honorable Court order judgment against the Commissioner as follows:

1. Respondent abused his discretion in rejecting the officers in compromise submitted during

the CDP Hearing.

2. Respondent abused his discretion in sustaining the levy actions.

3. The dates on the Notices of Determination control the finality of agency action.

4. The administrative record in this case omitted key evidence.

5. Remand the case back to IRS Appeals Office for re-evaluation of the Offer in Compromise.

6. Direct Respondent to recompute the reasonable collection potential for acceptable Offers In Compromise, based on changed circumstances provided.

7. Direct Respondent to apply the special circumstances presented to its analysis of acceptability of the Offers In Compromise submitted.

8. Such further relief as this Honorable Court may deem just and proper.

Dated: May 4, 2007

By_____
Michael Cornwell and

Hilary J. Iker,
Petitioners
2395 Kenilworth Avenue
Los Angeles, CA 90039
Tel: (323) 663-0345

SUPREME COURT, U.S.
JAN - 5 2010
OFFICE OF THE CLERK

No. : 09-704

In the

Supreme Court of the United States

MICHAEL D. CORNWELL AND HILARY J. IKER,
Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICUS CURIAE* LARRY E. TUCKER IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

CARLTON M. SMITH
Counsel of Record
CARDOZO TAX CLINIC
BENJAMIN N. CARDOZO SCHOOL OF LAW
55 Fifth Avenue
New York, New York 10003
(212) 790-0381

January 2010

DICK BAILEY SERVICE (212) 608-7666 (718) 522-4363 (516) 222-2470 (914) 682-0848 Fax (718) 522-4024
1-800-531-2028

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INTEREST OF THE AMICUS CURIAE[1]

Amicus, Larry E. Tucker, is interested in this case because, in June 2008, he first raised the identical Appointments Clause issue in his own case before the United States Tax Court (Tax Court Docket No. 3165-06L). His case is the original source of nearly all of the Appointments Clause arguments made by the petitioners herein. As detailed below, the Appointments Clause issue has been extensively briefed since then in Mr. Tucker's case, but the Tax Court has not yet ruled. Rather, the Tax Court has ordered a fifth set of briefs on the Appointments Clause issue. Since the petitioners did not raise the Appointments Clause issue either in the Tax Court or the Ninth Circuit, it makes sense

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[1] This brief *amicus curiae* in support of petitioners' application is filed in accordance with Rule 37.2(a). The parties have consented to the filing of this brief The petitioners are currently proceeding in this case *pro se*. Both the petitioners and counsel of record for the respondent, the Solicitor General of the United States, received notice at least 10 days prior to the due date of the *amicus curiae*'s intention to file this brief. No counsel for a party authored this brief in whole or in part; nor did any person other than Yeshiva University, the employer of counsel for the *amicus curiae*, the Director of the Cardozo Tax Clinic, make a monetary contribution to the preparation or submission of this brief. Larry E. Tucker is a client of the Cardozo Tax Clinic. Since 2004, the Cardozo Tax Clinic has been representing him for free in his collection matters with the Internal Revenue Service and in his United States Tax Court litigation against the Commissioner of Internal Revenue in connection therewith. The Cardozo Tax Clinic is operated by the Benjamin N. Cardozo School of Law of Yeshiva University.

to here acquaint this Court at more length than usual with the *Tucker* case:

In 2004, the Internal Revenue Service (hereinafter, the "IRS") filed a notice of tax lien against Mr. Tucker. In response, under 26 U.S.C. §6320, he timely requested a "Collection Due Process" (hereinafter, "CDP") hearing from the IRS Office of Appeals (hereinafter, the "Appeals Office"). At the hearing, to resolve his tax liabilities, Mr. Tucker submitted an offer-in-compromise (hereinafter, an "OIC"). The hearing was held before an employee of respondent's Appeals Office with the title of "Settlement Officer". In January 2006, the OIC was denied in a notice of determination issued by the Settlement Officer and her "Appeals Team Manager". Mr. Tucker then filed an appeal of this denial with the Tax Court, arguing both that the reason given by the Settlement Officer for denying his OIC was not a valid legal one and that only "Appeals Officers", not "Settlement Officers", were authorized by statute (as opposed to IRS delegation orders) to hold CDP hearings and issue CDP rulings.

Within a few months, respondent abandoned the reasoning of the Settlement Officer for denying Mr. Tucker's OIC and moved for a remand of the case to the Appeals Office for issuance of a supplemental notice of determination. Over Mr. Tucker's strenuous objection to a mere "do over", the Tax Court ordered the remand. Before the remand occurred, Mr. Tucker moved that the Tax Court direct that an Appeals Officer hold the remand, not a Settlement Officer. However, the Tax Court found an ambiguity in the statute (26 U.S.C. §6330(b) and

(c)) that it thought authorized any "officer or employee" of the Appeals Office to issue the ruling, citing the Tax Court's recent memorandum opinion in *Reynolds v. Commissioner*, T.C. Memo. 2006-192. Thus, the Tax Court permitted the remand to be held by a Settlement Officer.

In September 2006, a new Settlement Officer and the same Appeals Team Manager issued a supplemental notice of determination again denying Mr. Tucker's OIC, but on different grounds. Thereafter, the parties cross moved for summary judgment on the issue of whether the denial of the OIC was an abuse of discretion.

In June 2008, while those cross motions were pending, the Tax Court allowed Mr. Tucker to amend his petition to allege: "To date, no Appeals Officer, Settlement Officer, or Appeals Team Manager has been appointed to his or her job by the President of the United States with the advice and consent of the Senate;" and "No statute provides for the appointment of Appeals Officers, Settlement Officers, or Appeals Team Managers by the President alone, the 'Heads of Department', or the 'Courts of Law', as those terms are used in the Appointments Clause of the Constitution."

In response, the respondent admitted both sentences. See petitioners' petition in the instant case at App., pp. A-22 to A-23. Then, in September 2008, Mr. Tucker moved that the Tax Court disregard the rulings in the supplemental notice of determination on the ground that the persons issuing the rulings were not properly appointed. The

Tax Court filed Mr. Tucker's Appointments Clause motion as a motion to remand, directed that the pending but undecided cross motions for summary judgment in the case be held in abeyance, and directed respondent to file a response to the Appointments Clause motion.

The Tax Court has taken the Appointments Clause motion in *Tucker* very seriously. It has repeatedly ordered further legal memoranda on the issue. One order of Tax Court Judge David Gustafson, dated January 16, 2009, stated, in part:

> The same reasoning that would resolve this tax case arising under Title 26 would have to be able to apply broadly across the federal administrative agencies. The ... Court is concerned that it not decide this case from a too-narrow tax perspective.
>
> . . . .
>
> 1. . . . . The Court would like to be informed of examples of federal employees who are acknowledged to be "Officers" within the meaning of the Appointments Clause, whose office (like that of an appeals officer) is *not* explicitly created by statute (like the Special Trial Judge), but rather is referred to in a statute (like the appeals officer).
>
> 2. On the other hand, the Court would also like to be informed of examples of federal employees whose positions are referred to (but

not explicitly created in) a statute, and who are hired and not "appointed", but who have responsibilities or powers comparable to appeals officers and thus might be affected by a conclusion that appeals officers are "Officers" within the meaning of the Appointments Clause.

To date, at the direction of the Tax Court, the parties in *Tucker* have already filed four sets of legal memoranda on the Appointments Clause motion. Further, A. Lavar Taylor, Adjunct Professor of Law, Chapman University School of Law, Director, Center for the Fair Administration of Taxes, has filed with the Tax Court an *amicus curiae* brief in support of Mr. Tucker's Appointments Clause argument. The last set of the parties' briefs in *Tucker* was filed in late March 2009, but on December 1, 2009, the Tax Court issued a 6-page order for another set of briefs -- respondent's to be filed by January 15, 2010 and Mr. Tucker's to be filed by February 15, 2010 -- primarily addressed to how final the respondent considers the CDP rulings of Appeals personnel to be within the IRS.

A second argument in *Tucker* concerns the remedy if the Appointments Clause was violated. Mr. Tucker has asked that the Tax Court order another remand to the Appeals Office -- this time for a properly-appointed person to rule on his OIC. Although not stated in the petition for *certiorari* herein, presumably, this is the relief that the petitioners seek, as well. Further, because an OIC amount and payment terms are proposed based on facts existing at the time the OIC is made, Mr.

Tucker argues that any remand should not inquire into facts postdating the issuance of the original CDP notice of determination.

ARGUMENT

I. THE COLLECTION DUE PROCESS APPOINTMENTS CLAUSE ISSUE WARRANTS SUPREME COURT REVIEW AT THIS TIME

In 1998, Congress enacted what it called the "Collection Due Process" provisions of the Internal Revenue Code -- 26 U.S.C. §§6320 and 6330 -- by §3401(a) and (b) the Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. 105-206 (hereinafter, the "1998 Act"). The CDP provisions allow taxpayers to request hearings at the Appeals Office either shortly before or shortly after the IRS takes either of two potentially devastating collection actions: a levy or the filing of a notice of federal tax lien. In those hearings, the hearing officer must evaluate the appropriateness of collection actions, and taxpayers can propose collection alternatives -- such as an OIC, an installment agreement, or being placed into "currently not collectible status." Taxpayers may also request relief from joint and several liability and, in limited circumstances, raise challenges to the underlying tax liability.

Like Mr. Tucker, the petitioners submitted an OIC at a CDP hearing, and they were denied the OIC in a notice of determination issued by a Settlement Officer and an Appeals Team Manager.

Like Mr. Tucker, the petitioners timely appealed the denial to the Tax Court. Unlike Mr. Tucker, the petitioners did not raise the Appointments Clause argument during their Tax Court or Ninth Circuit appeal. Thus, neither court discussed the Appointments Clause when finding no abuse of discretion.

In their petition for a writ of *certiorari*, the petitioners rely on this Court's opinions in *Buckley v. Valeo*, 424 U.S. 1 (1976), and *Freytag v. Commissioner*, 501 U.S. 868 (1991), to argue that CDP hearing officers – whether they be Appeals Officers, Settlement Officers, and/or Appeals Team Managers – indeed, whichever among them is "the Decider" -- are now established by law and now exercise such significant authority on behalf of the United States that they must be appointed. In *Tucker*, respondent has contended otherwise, arguing:

> Appeals officers do not exercise significant authority because: (1) the scope of their duties and the review they conduct under CDP (as in other contexts) are limited; (2) their determinations are not the IRS's final decision regarding collection; and (3) their positions are not established by law. Although RRA 98 [the Internal Revenue Service Restructuring and Reform Act of 1998], codified a collection review mechanism largely already performed by the Office of Appeals, Congress did not establish by law an office that exercises significant authority or is delegated sovereign

> powers of the government. Thus, Appeals officers are employees, not inferior officers.

Respondent's October 31, 2008 memorandum in *Tucker*, at 7.

In deciding whether to grant the writ of *certiorari* in this case, the importance of this constitutional question both to the separation of powers and to the revenue cannot be understated:

First, as to the revenue: In the fiscal year ending September 30, 2009, nearly $50 billion was collected by the IRS through its enforcement mechanisms. IRS Fiscal Year 2009 Enforcement Results, available at www.irs.gov. In that same year, the IRS filed 965,618 notices of federal tax lien and served 3,478,181 levies on third parties. *Id.* At least hundreds of thousands of potential CDP-triggering notices preceded these lien filings and levies. In the fiscal year ended September 30, 2008, the IRS Appeals Office closed 27,024 CDP cases (through hearing or taxpayer withdrawal of the hearing request). Respondent's January 22, 2009 memorandum in *Tucker*, at 14. As of the end of that fiscal year, 1,333 CDP appeals were pending in the Tax Court, and 157 CDP appeals were pending before the Courts of Appeals. Respondent's October 31, 2008 memorandum in *Tucker*, at 33. For the last six fiscal years, the IRS National Taxpayer Advocate has reported to Congress that court proceedings involving appeals from CDP notices of determinations were the first- or second- "most frequently litigated tax issue" -- with the courts issuing about 200 opinions each year in CDP cases.

IRS National Taxpayer Advocate 2003 Annual Report to Congress (Dec. 31, 2003), at pp. 314-316; IRS National Taxpayer Advocate 2004 Annual Report to Congress (Dec. 31, 2004), at vol. I, pp. 496-497; IRS National Taxpayer Advocate 2005 Annual Report to Congress (Dec. 31, 2005), at vol. I, p. 473; IRS National Taxpayer Advocate 2006 Annual Report to Congress (Dec. 31, 2006), at vol. I, p. 555; IRS National Taxpayer Advocate 2007 Annual Report to Congress (Dec. 31, 2007), at. vol. I, pp.560-561; IRS National Taxpayer Advocate 2008 Annual Report to Congress (Dec. 31, 2008), at vol. I, p. 457.

Second, there is the separation of powers issue: In assigning administrative adjudicative duties that have historically been wielded by appointed officers to mere unappointed civil servants, the Executive Branch is undermining the important protections of the Appointments Clause and the political accountability that the Founding Fathers intended that the Clause impose. In this case, the Executive has both made the President immune from blame by not being directly responsible for naming bad administrative judges in the IRS and has cut out (without Congress's permission) Congress' right and obligation to provide advice and consent to particular administrative judges. Thus, this case also presents an important occasion for this Court to clarify who needs to be appointed under the Appointments Clause in the federal administrative judiciary.

At present, all "administrative law judges" (hereinafter, "ALJs") who issue rulings under the procedures of the Administrative Procedure Act are

appointed pursuant to the procedures of the Appointments Clause. Respondent's February 27, 2009 memorandum in *Tucker*, at 9, reported: "As of June 2008, there were 1,388 administrative law judges serving in various federal agencies . . . . Data from OPM [Office of Personnel Management] Central Data Personnel File Report, June 2008. . . . An individual must be certified by OPM and appointed under 5 U.S.C. §3105 in order to be an administrative law judge." Respondent also attached to this memorandum in *Tucker* a table from the cited OPM report showing that 1,137 of these 1,388 appointed ALJs worked for the Social Security Administration, but not a single one of them worked for the Department of the Treasury or the Internal Revenue Service.

In *Tucker*, respondent also attached as an exhibit to the same memorandum an unpublished survey by Raymond Limon, Esq., Acting Deputy Assistant Director, Office of Administrative Law Judges, entitled "The Federal Administrative Judiciary: Then and Now, A Decade of Change, 1992-2002" (Dec. 23, 2002) (hereinafter, the "Limon Paper"), reporting the results of a 2002 survey of "non-ALJ" federal "administrative judges". The Limon Paper stated that in 2002, the federal administrative judiciary contained 3,183 non-ALJ "administrative judges". The distinction drawn between ALJs and non-ALJs is that the latter hearing officers do not hold hearings complying in all respects with the Administrative Procedure Act. Many of those non-ALJ "administrative judges" are also appointed, such as the 56 members of the Board of Veterans Affairs, who are appointed by the

President alone or by the Secretary of the Department of Veterans Affairs pursuant to 38 U.S.C. §§7101(b)(1) and 7101A(a)(1); the 62 administrative patent judges, who are appointed by the Secretary of Commerce pursuant to 35 U.S.C. §6(a); the 15 administrative trademark judges, who are appointed by the Secretary of Commerce pursuant to 15 U.S.C. §1067(b); and the 228 immigration judges in the Executive Office for Immigration Review of the Department of Justice, who are appointed by the Attorney General pursuant to 8 U.S.C. §1101(b)(4).

The largest contingents of non-ALJ "administrative judges" listed in the Limon Paper were 1,000 patent examiners working for the Board of Patent Appeals and Interferences (who appear to be more like IRS revenue agents than hearing officers) and 750 IRS Appeals Officers and 200 IRS Settlement Officers. A more recent breakdown of Appeals Office personnel (as of September 30, 2006) is 812 Appeals Officers and 310 Settlement Officers; IRS National Taxpayer Advocate 2006 Annual Report to Congress (Dec. 31, 2006) at vol. I, p. 277; though the number of Settlement Officers is anecdotally rising because of increasing demand for CDP hearings. It is the over 300 Settlement Officers and their Appeals Team Managers who are potentially at risk by the Appointments Clause issue raised in this case, since they are the ones who currently hold nearly all CDP hearings.

In his February 27, 2009 memorandum in *Tucker*, at 11, respondent admitted: "IRS Appeals employees conducting CDP hearings fall into the

category of non-ALJ hearing officers." But, he pointed out that some other similar hearing officers in other Departments who were named in statutes (just like IRS "Appeals Officers") were not appointed. However, the examples given by respondent of unappointed persons named in statutes to hold hearings were few and were usually of non-ALJ hearing officers who did not render the final decision of the Department, but simply rendered a decision that could be reviewed on a *de novo* standard by an appointed person within the Department if an aggrieved person requested or if an appointed person in the Department decided to step in. Thus, it appears that the largest number of unappointed non-ALJ hearing officers is the over 300 IRS Settlement Officers and Appeals Team Managers at issue in this case. A decision that these hearing officers must be appointed will have repercussions in other Executive Departments, but to far fewer employees in these other Departments. Yet, it will still set forth important constitutional limits as to the ability of the Executive or the Congress to establish similar new posts in an end run around the Appointments Clause.

This Court is considering an Appointments Clause issue in *Free Enterprise Fund and Beckstead and Watts, LLP v. Public Company Accounting Oversight Board*, 537 F.3d 667 (D.C. Cir. 2008), Sup. Ct. Docket No. 08-861. However, in that case, the issue turns on the question of regular "Officer" versus "inferior Officer" under the Clause. Thus, the decision in that case is not likely to resolve whether administrative judges in the IRS are so unimportant in their duties that they do not even constitute

"inferior Officers". So, the Court should still agree to hear the petitioners' case.

More likely to be affected by the petitioner's case is the separation of powers issue presented by the creation of Executive Department "Czars". For example, after the passage of the Troubled Asset Relief Program, the Treasury Secretary administratively created a "Special Master" for compensation. The Treasury Secretary appointed Kenneth Feinberg to the post, without the advice and consent of the Senate or a law from Congress delegating to the Treasury Secretary the right to appoint without its consent. Former Tenth Circuit Judge Michael W. McConnell is now a professor at Stanford Law School, director of its Constitutional Law Center, and a senior fellow at the Hoover Institution. He has publicly argued that Mr. Feinberg – by virtue of his substantial powers -- is at least an "inferior Officer" of the United States who has to be appointed under the Appointments Clause to issue valid rulings. *See* Michael W. McConnell, "The Pay Czar Is Unconstitutional", *Wall Street Journal*, Oct. 30, 2009, at A25. A ruling that CDP hearing officers are required to be appointed may give guidance to whether the "Pay Czar" in the same Department needs to be appointed. Professor McConnell is now one of the many law school professors, described below, following developments in the CDP hearing officer appointments cases, *Tucker* and the instant case.

Congress also has become concerned that its Appointments Clause powers are being usurped by the Executive with respect to other "Czars". Indeed,

the concern has been so great that hearings were held in the Senate in October. "[T]his Administration has appointed at least 18 new 'czars.' None of these officials was vetted through the Senate confirmation process. Their authorities and duties remain unclear. Their future plans have received little public airing. Their relationship with Cabinet-level officials is undefined. They rarely, if ever, testify before Congressional committees." Statement of Senator Susan M. Collins, *Hearings on Presidential Advice and Senate Consent: The Past, Present, and Future of Policy Czars*, Senate Comm. on Homeland Security and Governmental Affairs (Oct. 22, 2009), at pp. 4-5, available at http://hsgac.senate.gov/public/index.cfm?FuseAction=Hearings.Hearing&Hearing_ID=5b22e173-5b74-46a0-b2ab-d300b6381de4.

Respondent's counsel in *Tucker*, has informed counsel for the *amicus* that there are already three other Tax Court petitioners who have raised the Appointments Clause issue and are awaiting the Tax Court's ruling in *Tucker*. But, there are far more people interested in the outcome of *Tucker* who are taking a wait and see approach to raising the issue. At American Bar Association Tax Section meetings and meetings involving other free low-income taxpayer clinics, counsel for the *amicus* has been asked to update other lawyers about the progress of the *Tucker* case. Professors at law schools across the country who specialize in administrative law, constitutional law, and tax law have also asked counsel for the *amicus* to keep them updated on the *Tucker* case. Counsel for the *amicus* published an article on the subject over a year ago. See Carlton

M. Smith, "Does The Failure to Appoint Collection Due Process Hearing Officers Violate the Constitution's Appointments Clause?", Vol. 10, No. 5 *J. Tax Practice & Procedure* 35 (Oct.-Nov. 2008). An earlier version of this article is available for download at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1279060. Because of the publication of this article, other tax practitioners are aware of the constitutional argument and the seriousness of it. Counsel for the *amicus* has discussed the argument with lawyers high up in the IRS (Deborah Butler, the current IRS Associate Chief Counsel (Procedure and Administration)) and the Department of Justice Tax Section Appellate Section (Gilbert Rothenberg). A deputy to IRS National Taxpayer Advocate Nina Olson has asked counsel for the *amicus* to keep the deputy copied on all briefs filed in the Tucker case, and counsel for the *amicus* has done so.

Should individuals or entities desire to gum up the tax collection works, all they need to do now is to stop paying their taxes and ask for a CDP hearing by an appointed officer. Currently, there are none. It would be too risky for the IRS to await a ruling from the Tax Court in *Tucker* (apparently coming no earlier than late 2010 now) and then follow the slow progression of the Appointments Clause issue up through the appellate courts.

This Court has a history of taking up important tax procedures issues, even in the absence of Circuit splits or when lower courts have ruled and found no problem. For example, *Freytag v. Commissioner, supra*, involved a challenge to the Tax Court's Special Trial Judges based on the

Appointments Clause. *Freytag* is the principal opinion of this Court on which the petitioners rely in this case. Prior to *Freytag*, 18 lower-court judges had considered the Appointments Clause issue (15 Tax Court judges and 3 Second Circuit judges) and none had found a problem, yet this Court decided to take up the issue because of its importance to the separation of powers, to tax procedure, and to the revenue. Similarly, in *Ballard v. Commissioner*, 544 U.S. 40 (2005), only 1 of 9 Circuit judges thought there was an impropriety in the Tax Court's not including in the appellate record for review a copy of the Special Trial Judge's report, yet this Court took up the issue and reversed, finding an impropriety.

By contrast, in the Settlement Officer case, a single Tax Court judge in *Tucker* has not been able to convince himself that there is no constitutional violation – despite four sets of briefs already filed by respondent, spanning over a year. The government has been thinking about this issue for over 18 months (since June 2008) and already now has written well over a hundred pages of briefs on the issue in *Tucker*. Taxpayers and *amicus* in *Tucker* have written even more pages on the subject. Even though the petitioners in this case did not raise the issue of the Appointments Clause in the courts below, the issue is ripe for argument in this Court.

The remedy issue was not discussed in the petition, but should also be considered. The remedy should be a remand for a rehearing before a properly-appointed Appeals Office person. In that rehearing, the Appeals Office person should only be allowed to consider such facts as existed up to and

including the date that the original notice of determination was issued. Financial facts change daily. The Tax Court has held that it does not renegotiate or try to determine a correct OIC, but merely that it reviews whether the IRS abused its discretion in rejecting the exact OIC proposed. *Murphy v. Commissioner*, 125 T.C. 301, 320 (2005), *affd.* 469 F.3d 27 (1st Cir. 2006) ("We do not conduct an independent review of what would be an acceptable offer in compromise. . . . The extent of our review is to determine whether the Appeals officer's decision to reject the offer in compromise actually submitted by the taxpayer was arbitrary, capricious, or without sound basis in fact or law." (internal citations omitted)). If a remand results in an inquiry into current financial facts, then the original OIC will certainly be in the incorrect current amount. Thus, the original OIC will automatically be rejected. In sum, relief given of a remand to consider current facts would be wholly illusory, as it would never result in the original OIC being accepted.

The relief of a remand would not be burdensome. The first remand in *Tucker* in 2006 took fewer than 5 business days from the time the new Settlement Officer got the files. Oddly, however, respondent in *Tucker* has argued that, even if there was an Appointment Clause violation, there should be no relief. Respondent argues that the Tax Court should apply the *de facto* officer doctrine to validate any actions taken by unappointed officers who should have been appointed. Respondent's October 31, 2008, memorandum in *Tucker*, at 30-34;

Respondent's January 22, 2009, memorandum in *Tucker*, at 9-17.

In *Ryder v. United States*, 515 U.S. 177 (1995), after this Court found an Appointments Clause violation, it refused to apply the *de facto* officer doctrine and ordered a new court-martial panel hearing before a properly-appointed panel. Respondent, in *Tucker*, argues that, despite *Ryder*, the *de facto* officer doctrine may still be applied in civil cases involving Appointments Clause violations and that it would be too burdensome to allow Mr. Tucker another remand to the Appeals Office. In other words, a remand is not a burden when respondent simply cries "Mulligan", but a remand is a burden when respondent violates the Constitution. The Court should ask for briefing in the instant case on this astounding proposition.

II. THE HISTORICAL BACKGROUND OF THE IRS APPEALS OFFICE AND THE BOARD OF TAX APPEALS SUPPORTS THE NEED FOR APPOINTMENT OF COLLECTION DUE PROCESS HEARING OFFICERS

Ever since Congress established the Treasury Department in 1789, the federal government has provided an administrative appeal process to taxpayers who do not agree with proposed tax assessments. IRS National Taxpayer Advocate 2006 Annual Report to Congress (Dec. 31, 2006) at vol. I, p. 266. The current Office of Appeals was administratively created in 1978 as a successor to what had been known as "the Appellate Division".

See Amendments to the Statement of Procedural Rules (26 C.F.R. Part 601), published in 43 F.R. 44,510 (Sept. 28, 1978), 1978-2 C.B. 543. While some employees of the Appellate Division may have had the title "Appeals Officer" for some time before the reorganization, employees of the new Office of Appeals referred to as "Appeals Officers" were first referred to by that name in these 1978 amendments. See, e.g., 26 C.F.R. §601.105(c)(1)(ii).

The historic role of an Appeals Officer has been to resolve disagreements with income, estate, and gift tax audit adjustments proposed by the IRS Examination Division. When the Examination Division issues its report, it invites a taxpayer who disagrees to file a protest requesting a conference with the Appeals Office. See IRS Publication 5, Your Appeal Rights and How to Prepare a Protest if You Don't Agree. Appeals Officers are experts in the tax law, both substantive and procedural tax law – trained to read court opinions, even though not usually lawyers. Many Appeals Officers are former Examination Division revenue agents. Appeals Officers resolve matters before them on a practical basis, using "hazards of litigation" settlement authority not available to the Examination Division employees. 26 C.F.R. §601.106(f)(2). Appeals Officers frequently take settlement jurisdiction over Tax Court deficiency cases and resolve most, so that IRS lawyers only have to litigate or settle a few. 26 C.F.R. §601.106(d)(3)(iii); Rev. Proc. 87-24, 1987-1 C.B. 720.

Settlement Officers were first created in the late 1980s or early 1990s to work collection cases in

the Appeals Office. Respondent's Answers to Petitioner's Request for Admissions (Nov. 3, 2006) in *Tucker*, paras. 1 and 4. In 2002, then-IRS Commissioner Charles Rossotti told Congress that "until relatively recently, IRS Appeals dealt with few collection issues. It began moving toward post-collection work in the 1990s when a number of programs were established to ensure taxpayers had the right to dispute actions, such as levies and liens. At the same time, we began hiring settlement officers (former revenue officers with collection background) to handle these cases." Testimony of Charles Rossotti to the Joint Committee on Taxation Annual Joint Review Progress Report on the Internal Revenue Service Restructuring and Reform Act of 1998 (May 14, 2002) at para. 97, reproduced at 2002 TNT 94-19 (May 15, 2002). These comments about Settlement Officers were addressed to the period before the passage of the 1998 Act. For an article discussing the differences between the two Appeals Office employees and why Congress probably did not know of the existence of Settlement Officers when it enacted CDP and did not intend for Settlement Officers to hold CDP hearings, see Carlton M. Smith, "Settlement Officers Shouldn't Hold Collection Due Process Hearings", 121 *Tax Notes* 609 (Nov. 3, 2008), and 2008 TNT 214-26 (Nov. 4, 2008).

Since 1998, the IRS has increasingly shifted CDP hearings from Appeals Officers to lower-paid Settlement Officers. Unlike generalist Appeals Officers, Settlement Officers are narrow collection specialists, with no substantive tax knowledge and almost no experience in settling cases facing possible

de novo review in the Tax Court or other courts. They too often misapply the law, apply Internal Revenue Manual collection provisions in rigid, impractical ways, and show basic unfamiliarity with common business and personal financial transactions. However, it is unnecessary for this Court to resolve whether Congress authorized the IRS to substitute Settlement Officers for Appeals Officers in holding CDP hearings. If this Court holds that no Appeals Office employee needs to be appointed for CDP, then the lower courts can deal with any issues of statutory authorization as to which employees may rule. If this Court holds that CDP hearing personnel must be appointed, then Congress and the President will have to appoint some, thereby rendering moot for the future the question of whether any particular kind of person must be appointed.

Before the Tax Court's predecessor, the Board of Tax Appeals, was created in 1924, the only way to litigate a civil tax dispute was by a refund lawsuit in court under what is now 28 U.S.C. §1346(a)(1). The taxpayer first had to pay all of the tax (in the 19th Century, usually, a tariff) and then file an administrative claim for the alleged excessive amount. If the government denied the claim, the taxpayer could bring suit in district court or the Court of Claims. See *Flora v. United States*, 362 U.S. 145, 151-161 (1960).

Shortly before World War I, Congress enacted the income, estate, and gift taxes, and there arose a hue and cry that this pay-first, litigate-later system was inadequate with respect to proposed deficiencies

in such new taxes. In response, the predecessor of the IRS, the Bureau of Internal Revenue (hereinafter, the "BIR"), set up an internal committee in the predecessor of the current Appeals Office: The "Committee on Appeals and Review" was an advisory committee, eventually having 20 members, whose job was to hear appeals of deficiency assessments before collection thereof and to hear claims for abatement of assessed taxes. H. Dubroff, *The United States Tax Court: An Historical Analysis* (CCH 1979), at 39-45. But this Committee was thought by many to be inadequate and potentially biased.

Accordingly, President Coolidge proposed (1) creation of a Board of Tax Appeals within the Treasury Department but outside the BIR and (2) that the Treasury Secretary be given the power to appoint its members pursuant to the procedures for appointing "inferior Officers" contained within the Appointments Clause. *Id.* at 52-53. In 1924, when Congress actually created the Board of Tax Appeals, though, it made the Board an Executive agency independent of the Treasury Department, and provided by statute for the appointment of the Board's members by the President with the advice and consent of the Senate. *Id.* at 55-60; Revenue Act of 1924, ch. 234, §900(a), (b), and (k), 43 Stat. 336-338. Congress limited the Board's jurisdiction to "deficiencies" in income, estate, excess profits, and gift taxes that had not yet been assessed – i.e., prior, as well, to collection – and review of jeopardy assessments for which claims for abatement had been filed. Revenue Act of 1924, ch. 234, §§ 274(a), 279(b), 308(b), 312(b), and 324, 43 Stat. 297, 300,

308, 312, 316. The Board was, in effect, a statutory successor to the nonstatutory Committee on Appeals and Review. Duroff, op. cit. at 43 ("In many respects the Board of Tax Appeals was a continuation of the Committee.").

Congress knew in 1924 that it could not by statute create a new pre-collection administrative hearing in the Executive (a Board of Tax Appeals) without the hearing employees being "Officers" subject to appointment under the Appointments Clause. In 1991, this Court confirmed that Congress was right with respect to the successor to the Board of Tax Appeals – the Article I court known as the Tax Court. In *Freytag v. Commissioner*, *supra*, all nine Justices held that Special Trial Judges of the Tax Court were "inferior Officers" under the Appointments Clause.

In the 1990s, taxpayers raised another hue and cry that the pre-collection hearings of the Tax Court were inadequate to prevent collection abuses by the IRS – the successor to the BIR. In response, Congress held hearings. "A 'system of administrative law judges' was proposed during the Senate Finance Committee hearings leading up to enactment of RRA 98. *IRS Restructuring: Hearing on H.R. 2676 Before the Senate Comm. on Finance*, 105th Cong. 128 (1998) (statement of Robert Schriebman, Tax Attorney). Congress at that time considered outside administrative law judges but selected Appeals employees due, in part, to the informality of the hearings and the efficiency of assigning 'new' duties that were essentially the same as their existing duties." Respondent's October 31,

2008 memorandum in *Tucker*, at 17 (footnote omitted). As a result, unlike what Congress did in 1924, this time, Congress created the statutory hearing right within the IRS Appeals Office.

What is odd is that, in 1998, Congress seems to have forgotten that, in creating another statutory pre-collection hearing in an Executive Department, the hearing employees were being given such powers by law that they also had to be appointed under the Appointments Clause. Congress cannot simply decide to give an important new statutory hearing to a preexisting lower-paid civil servant and thereby avoid the Appointments Clause or this would make the Clause a mere point of protocol or etiquette. "The Appointments Clause could, of course, be read as merely dealing with etiquette or protocol in describing 'Officers of the United States,' but the drafters had a less frivolous purpose in mind." *Buckley v. Valeo*, supra, at 125.

CONCLUSION

For the above-stated reasons, a writ of certiorari should issue to review the decision of the Ninth Circuit to consider the Appointments Clause issues.

Respectfully submitted,

CARLTON M. SMITH
Counsel of Record
Cardozo Tax Clinic
BENJAMIN N. CARDOZO
SCHOOL OF LAW
55 Fifth Avenue
New York, New York 10003
(212) 790-0381

Attorney for Amicus Curiae

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